No. 17-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SARAH BAUMGARTEL
Counsel of Record

FEDERAL DEFENDERS OF NEW YORK, INC.
APPEALS BUREAU
52 Duane Street, 10th Floor
New York, New York 10007
E-mail: sarah_baumgartel@fd.org
Tel. No. (212) 417-8772

Attorney for Petitioner

QUESTIONS PRESENTED

(1) Whether convicted sex offenders are "required to register" under the federal Sex Offender Notification and Registration Act ("SORNA") while in custody, regardless of how long they have until release.

(2) Whether all offenders convicted of a qualifying sex offense prior to SORNA's enactment are "required to register" under SORNA no later than August 1, 2008.

(3) Whether a defendant violates 18 U.S.C. § 2250(a), which requires interstate travel, where his only movement between states occurs while he is in the custody of the Federal Bureau of Prisons and serving a prison sentence.

(4) Whether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 6

ARGUMENT 7

POINT I

SORNA Does Not Require Sex Offenders to Register While in Custody 7

POINT II

Liability for a Violation of 18 U.S.C. § 2250(a) Should Not Be Predicated on Custodial Movement 16

POINT III

SORNA Improperly Delegates Legislative Authority to the Attorney General 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Carr v. United States,
560 U.S. 438 (2010) ..... *passim*

J.W. Hampton, Jr., & Co. v. United States,
276 U.S. 394 (1928) 18

Johnson v. United States,
559 U.S. 133 (2010) 15

Mistretta v. United States,
488 U.S. 361 (1989) 18

Schechter Poultry Corp. v. United States,
295 U.S. 495 (1935) 18

Panama Refining Co. v. Ryan,
293 U.S. 388 (1935) 8, 10, 18

Reynolds v. United States,
132 S. Ct. 975 (2012) 10, 18

United States v. Robbins,
729 F.3d 131 (2d Cir. 2013) 9, 15

Roberts v. Sea-Land Services, Inc.,
132 S. Ct. 1350 (2012) 15

Smith v. United States,
508 U.S. 223 (1993) 15

Sturgeon v. Frost,
136 S. Ct. 1061 (2016) 15

United States v. Alexander,
802 F.3d 1134 (10th Cir. 2015) 15

United States v. CITGO Petroleum Corp.,
801 F.3d 477 (5th Cir. 2015) 20

United States v. DiCristina,
726 F.3d 92 (2d Cir. 2013) 12

United States v. Fuller, 627 F.3d 499 (2d Cir. 2010) 18-19

United States v. Gaines,
295 F.3d 293 (2d Cir. 2002) 17

United States v. Gebhart,
441 F.2d 1261 (6th Cir. 1971) 17

United States v. Gibson Specialty Co.,
507 F.2d 446 (9th Cir. 1974) 17

United States v. Gundy,
804 F.3d 140 (2d Cir. 2015) 5

United States v. Guzman,
591 F.3d 83 (2d Cir. 2010) 9

United States v. Hinckley,
550 F.3d 926 (10th Cir. 2008) 19

United States v. Kebodeaux,
133 S. Ct. 2496 (2013) 14

United States v. Kopp,
778 F.3d 986 (11th Cir. 2015) 16

United States v. Nucci,
364 F.3d 419 (2d Cir. 2004) 16

United States v. Rodriguez,
416 F.3d 123 (2d Cir. 2005) 16

United States v. Sanders,
622 F.3d 779 (7th Cir. 2010) 9

Yates v. United States,
135 S. Ct. 1074 (2015) 15, 16

Federal Statutes and Other Authorities

8 U.S.C. § 1326 16
18 U.S.C. § 922(g)(1) 17
18 U.S.C. § 1519 15
18 U.S.C. § 2250 8
18 U.S.C. § 2250(a) 1, 3, 6, 14
18 U.S.C. § 2250(a)(1) 5, 12
18 U.S.C. § 2250(a)(2)(B) 14

18 U.S.C. § 3231 1
18 U.S.C. § 3742 1
18 U.S.C. § 4042(c)(2) 11
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 1
42 U.S.C. § 16913 ..... 2, 9
42 U.S.C. § 16913(d) 1, 17
42 U.S.C. § 16915 10
42 U.S.C. § 16915(a) 10, 13
42 U.S.C. § 16917(a) 10, 13
42 U.S.C § 16901 9
42 U.S.C. § 16913 2
42 U.S.C. § 16913(d) 1, 10, 21
U.S. Const. Art. I §§ 1, 8 ..... 2, 21

PETITION FOR A WRIT OF CERTIORARI

Petitioner Herman Avery Gundy respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit Court of Appeals issued two opinions. One is reported at 804 F.3d 140. The other opinion is an unpublished summary order, but appears at 2017 WL 2703578 and Pet. App. 1.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and entered judgment on June 16, 2016. The Second Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291 and entered judgment on June 22, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant Constitutional provision is U.S. Const. Art. I § 1, which states that "All legislative Powers herein granted shall be vested in a Congress …."

The relevant statutory provisions are codified at 18 U.S.C. § 2250(a) and 42 U.S.C. § 16901 *et seq.*, particularly 42 U.S.C. § 16913.[1]

Title 18 U.S.C. § 2250(a) provides, in relevant part,

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[1] 42 U.S.C. § 16913 was subsequently transferred to 34 U.S.C. § 20913.

(a) In general. – Whoever –

(1) is required to register under the Sex Offender Registration and Notification Act; . . .

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

Title 42 U.S.C. § 16913 provides:

(a) In general. A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration. The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current. A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section. The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply. Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

STATEMENT OF THE CASE

Petitioner was charged by indictment in the Southern District of New York on January 13, 2013 with one count of violating 18 U.S.C. § 2250(a) for traveling in interstate commerce and thereafter failing to register as required by the Sex Offender Registration and Notification Act (SORNA). He was convicted following a bench trial and sentenced to time served and five years of supervised release.

Petitioner was convicted of the state sex offense that creates his registration obligation on October 3, 2005. That day, he entered an *Alford* plea to Sexual Offense in the Second Degree, in violation of Maryland Criminal Law § 3-306. He was sentenced to 20 years in prison, with ten years suspended, and five years of probation.

At the time of this conviction, Petitioner was under federal supervised release following a 1994 federal drug conviction in the Eastern District of Pennsylvania. The Maryland state conviction triggered a violation of this federal supervised release, for which he was sentenced to 24 months' prison, to be served consecutively.

In 2011, Petitioner completed the carceral portion of his Maryland sentence and was deemed paroled by state authorities. He remained in physical custody in Maryland, however, now under the jurisdiction of the Federal Bureau of Prisons ("BOP") for service of his consecutive federal violation sentence. The BOP designated Petitioner to FCI Schuylkill to serve that sentence. In July 2011, he was physically transported from Maryland to FCI Schuylkill, which is in Pennsylvania.

After Petitioner was moved to Pennsylvania, the BOP determined that he could serve the final portion of his sentence in a community corrections facility, or halfway house, in New

York. The BOP ordered Petitioner's transfer via "unescorted commitment[]" to the Bronx Residential Re-Entry Center (RRC) located in New York. During an approximately eight-hour furlough on July 17, 2012, Petitioner transferred from FCI Schuylkill to the Bronx RRC. Petitioner was "in the custody of the BOP" at the time he moved between Pennsylvania and New York.

Petitioner remained at the Bronx RRC until August 27, 2012, when he was released from custody. He was approved for release to an address in the Bronx. Following his release from BOP custody, Petitioner lived in New York and did not travel between states.

Petitioner was arrested in the Bronx, New York on October 24, 2012 and ultimately charged with a violation of 18 U.S.C. § 2250(a). The indictment against him charged that, from in or about August 2012 through October 2012, being an individual required to register under SORNA, he traveled from Pennsylvania to New York and thereafter resided in New York without registering as a sex offender in New York.

In the district court, Petitioner moved to dismiss the indictment for failure to state an offense under § 2250(a). He recognized that he could be subject to state criminal penalties for failing to register as required, but argued that he was not subject to liability under § 2250(a) because his only interstate movement occurred while he was in BOP custody with at least thirty days remaining on his sentence – meaning he was not yet "required to register" under SORNA at the time of this movement. Petitioner further asserted that the indictment should be dismissed because criminal liability under § 2250(a) could not be based on custodial movement between states. He additionally raised several constitutional challenges to SORNA.

On May 22, 2013, the district court granted Petitioner's motion to dismiss, finding that he was not "required to register" within the meaning of § 2250(a)(1) at the time of his alleged interstate travel. The district court declined to reach his other arguments for dismissal. The government moved for reconsideration of this dismissal, which was denied. The government then appealed the dismissal.

On September 14, 2015, the Second Circuit reinstated the indictment against Petitioner. *See United States v. Gundy*, 804 F.3d 140 (2d Cir. 2015). In brief, the Circuit concluded that Petitioner was "required to register" within the meaning of 18 U.S.C. § 2250(a)(1) before his interstate movement, and therefore that the indictment should not have been dismissed. The court held that Petitioner was required to register no later than August 1, 2008, when the Attorney General applied SORNA to pre-Act offenders. The Circuit declined to reach additional arguments offered by Petitioner in support of dismissal.

Following remand to the district court, Petitioner renewed his motion to dismiss the indictment based on arguments not previously addressed by the district or circuit court. Specifically, Petitioner renewed his arguments that (i) he could not be liable for a violation of § 2250(a) because his only alleged interstate travel was while he was in the custody of the BOP; and (ii) SORNA improperly delegates legislative authority to the Attorney General, in violation of the Nondelegation Doctrine.

The district court rejected Petitioner's renewed motions to dismiss. Petitioner and the government agreed to conduct a bench trial on stipulated facts and agreed, *inter alia*, that Petitioner's only interstate movement occurred while he was in federal BOP custody.

On March 28, 2016, the district court conducted the bench trial and found Petitioner guilty of violating 18 U.S.C. § 2250(a). The court sentenced Petitioner to time served and five years of supervised release. The final amended judgment was entered on June 16, 2016.

Petitioner appealed his conviction to the Second Circuit. On June 22, 2017, the Circuit issued an unpublished summary order upholding Petitioner's conviction. The Circuit concluded that his interstate movement was sufficiently voluntary to satisfy the travel requirement of § 2250(a), assuming without deciding that the statute requires voluntary travel.

REASONS FOR GRANTING THE PETITION

In *Carr v. United States*, this Court held that 18 U.S.C. § 2250(a) has three elements that must be satisfied in sequence. The government must prove, first, that the defendant is "required to register under" SORNA; second, that he then "travels in interstate or foreign commerce"; and, finally that he thereafter "knowingly fails to register or update a registration as required by" SORNA.

In the prototypical § 2250 prosecution, a defendant resides out of custody in State A and is required to register in that state as a sex offender. He then travels to State B and fails to register. Here, however, the Second Circuit sanctioned prosecution of a defendant whose only travel between states occurred while he was in custody serving a sentence, and who remained continuously in one state following his release from custody. In doing so, the Second Circuit erroneously interpreted § 2250(a) to require sex offenders to participate in SORNA's community registration program while in prison. This is an interpretation that has not been endorsed by any other circuit; which conflicts with the Attorney General's interpretative Guidelines; and which is not consistent with the purposes of SORNA. It also conflicts with

the reasoning of this Court's decisions in *Carr v. United States* and *Reynolds v. United States*, and disturbs the traditional state-federal enforcement balance that SORNA sought to maintain, improperly subjecting to federal prosecution individuals who reside continuously in one state following their release from custody. The decision also imposes a significant and unnecessary burden on states to the extent that it holds SORNA requires registration of state offenders while they are in jail and prison.

In addition, the Second Circuit erroneously concluded that a custodial prison transfer can constitute "travel," an essential conduct element of a § 2250 offense. The Circuit also declined to hold that this essential conduct element required voluntary action. These decisions run afoul of the fundamental requirement that criminal liability be predicated on voluntary conduct. They are also an incorrect reading of the text of § 2250(a), inconsistent with the statutory context, intent and history.

Finally, this Court should take the opportunity to address a frequently recurring question in SORNA cases, which impacts hundreds of thousands of individuals – the question of whether Congress properly delegated to the Attorney General the question of whether SORNA's registration requirements should apply to offenders convicted prior to SORNA's enactment. The Court should rule that this was not a proper delegation of legislative authority.

ARGUMENT

SORNA Does Not Require Sex Offenders to Register While in Custody

Section 2250(a) of Title 18 subjects to federal prosecution anyone who is (i) "required to register under" SORNA; (ii) thereafter travels in interstate commerce; (iii) and knowingly fails to register or update a registry as required by SORNA. *See Carr*, 560 U.S. at 445-46. The

three elements must be met sequentially. *Id.* The dispute in this case relates to what satisfies § 2250(a)(1) and starts the sequence.

The Second Circuit held that individuals like Petitioner, who were convicted of a qualifying sex offense before SORNA was enacted, are "required to register" as of August 1, 2008 (the date that the Circuit finds that the Attorney General effectively applied SORNA to such pre-Act offenders). In other words, the Circuit held that sex offenders are legally required to participate in community sex offender registration programs while in prison, regardless of how many months or years they have remaining on their sentence. This interpretation of § 2250(a) has not been endorsed by any other Circuit and is not consistent with the statutory text, the Attorney General's interpretative Guidelines, or the legislative intent of SORNA.

In *Carr v. United States*, this Court held that conviction for a qualifying sex offense is *not* the event that triggers the start of § 2250(a)'s sequence. *See* 560 U.S. at 446-47, n.4. Instead the sequence is triggered when an individual is "required to register under" SORNA, as the text plainly states. *Id.* As a result, if an individual's only interstate travel occurs before he is required to register under SORNA, there is no violation of 18 U.S.C. § 2250. *See id.*; *see also Reynolds v. United States*, 132 S. Ct. 975, 980 (2012).

In both *Carr* and *Reynolds*, the defendant's interstate travel occurred either before SORNA was enacted or before the Attorney General validly applied SORNA to pre-Act sex offenders. Either way, the individual could not have been "required to register" under SORNA at the time of his interstate travel and therefore was not liable under § 2250(a). However, in those decisions this Court did not further detail when the first element is met.

The question of what starts this sequence and satisfies the first element of § 2250(a) was the focus of Petitioner's initial motion to dismiss and appeal. The most natural reading of the text is that the sequence starts when a person is required to register under SORNA, meaning that he is presently, actually required to register as a sex offender under federal law. Under this reading, § 2250(a)(1) incorporates by reference the various provisions of SORNA, 42 U.S.C §§ 16901 *et seq.*, detailing who is required to register, when someone must register, and what registration entails. *See United States v. Robbins*, 729 F.3d 131, 134 (2d Cir. 2013).

Reading § 2250 to incorporate the other statutory provisions of SORNA is the only way to identify who may be criminally liable under the statute, to give content to the phrase "to register," and to detail what an individual must do to avoid criminal liability. As the Circuits have recoginized, "§ 16913 and § 2250(a) have to be considered in tandem, because the former gives the latter substance." *Robbins*, 729 F.3d at 134; *see also United States v. Guzman*, 591 F.3d 83, 90 (2d Cir. 2010) (stating that § 16913 gives § 2250 substance); *United States v. Sanders*, 622 F.3d 779, 783 (7th Cir. 2010) (explaining that § 2250 attaches criminal penalties for those who fail to comply with registration requirements of § 16913 and travel interstate, and that the two statutes are "inextricably intertwined"). Thus, 42 U.S.C. § 16913 dictates when an offender is "required to register under" SORNA, as that phrase is used in § 2250(a).

Section 16913 contemplates three categories of individuals who may be required to register under SORNA: (i) future offenders who will be convicted of a qualifying sex offense and sentenced to prison, *see* 42 U.S.C. § 16913(b)(1); (ii) future offenders who will be convicted but not sentenced to prison, *see* § 16913(b)(2); and (iii) offenders (like Petitioner) convicted of a sex offense before SORNA's enactment, who might be in or out of custody, *see* § 16913(d).

Future offenders sentenced to prison must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 42 U.S.C. § 16913(b)(1); *see also* 42 U.S.C. § 16917(a) (requiring "appropriate official" to notify offenders of duty to register "shortly before release of the sex offender from custody"). Future offenders who are not sentenced to prison must register "not later than 3 business days after being sentenced for that offense." 42 U.S.C. § 16913(b)(2). The Attorney General determines registration requirements for pre-Act offenders or those in jurisdictions which have not implemented SORNA, and has stated that they should register as required by §16913. *See* 42 U.S.C. § 16913(d); 73 Fed. Reg. 38,063.

Both §§ 16913 and 16917 are specifically keyed to an individual's custodial status: individuals are not required to register upon conviction for a qualifying sex offense, or even immediately following sentencing if they are in custody. Instead, they are informed of their duty to register and must register within a certain timeframe pegged to when they will be free in the community. This comports with another provision of SORNA, 42 U.S.C. § 16915, which specifically states that offenders need not register while in custody. 42 U.S.C. § 16915(a) ("sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed)").

The Attorney General's Guidelines support this plain reading of the text. The Attorney General dictates the registration obligations of pre-Act offenders. These Guidelines are also essential to "eliminate the very kind of vagueness and uncertainty that criminal law must seek to avoid." *Reynolds*, 132 S. Ct. at 982.

Like the text of SORNA itself, the Attorney General's Guidelines tie an individual's duty to register under SORNA to his custodial status and do not require registration by pre-Act incarcerated offenders until shortly before release from custody. The Guidelines explain that pre-Act offenders in prison at the time of SORNA's implementation are required to register within the "normal SORNA time frame," which means shortly before release from prison. 73 Fed. Reg. 38,063-64. The Attorney General further states:

> "Shortly" does not prescribe a specific time frame, but jurisdictions should implement this requirement in light of the underlying objectives of ensuring that sex offenders have their registration obligations in mind when they are released, and avoiding situations in which registration information changes significantly between the time the initial registration procedures are carried out and the time the offender is released.

73 Fed. Reg. 38,063.[2]

Similarly, if a pre-Act offender completed his prison term for the sex offense, but is in custody for a different offense, the registration process is the same – he should register when released from imprisonment:

> the normal SORNA initial registration procedures and timing requirements will apply, but with the new offense substituting for the predicate registration offense as the basis for the time frame. In other words, such a sex offender must be initially registered in the manner specified in SORNA § 117(a) prior to release from imprisonment for the new offense that brought him back into the system . . . .

73 Fed. Reg. 38,063. This link between registration requirements and an individual's custodial status accords with the Guidelines' repeated recognition that registries are aimed at offenders

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[2] This timing is consistent with Federal Bureau of Prisons regulations which require registration "at least 5 days prior to release," but not earlier. 18 U.S.C. § 4042(c)(2); *see also* BOP Program Statement 5141.02 at 11. Inmates like Petitioner who are transferred to a pre-release community based program, or halfway house, must complete registration while at the halfway house. *See* BOP Program Statement 5141.02 at 8.

in the community. *See* 73 Fed. Reg. 38,044 ("In their most basic character, the registration aspects of these programs are systems for tracking sex offenders following their release into the community."); 73 Fed. Reg. 38,046 ("registration requirements generally come into play when sex offenders are released from imprisonment").

Considering SORNA's various statutory provisions together, and reading them in light of the Attorney General's Guidelines, sex offenders in prison, as Petitioner was in 2008, should not be "required to register" for purposes of 18 U.S.C. § 2250(a)(1) until shortly before the end of their sentence of imprisonment.

Under the specific facts of Petitioner's case, therefore, he was not required to register until August 2012, shortly before his release from custody. Because all of his interstate movement following his 2005 sex offense conviction occurred before August 2012, while he was still in custody with at least thirty days remaining on his prison sentence, Petitioner should not be guilty of a violation of 18 U.S.C. § 2250(a).

Rather than adopting this reading of § 2250(a), the Second Circuit held that all pre-Act offenders are required to register no later than August 1, 2008, regardless of their custodial status. For the reasons detailed above, this holding is not consistent with the text of the statute. It also contradicts the reasoning of this Court in *Carr* and the Attorney General's Guidelines.

Further, the Second Circuit's decision is difficult to square with the legislative goals of SORNA. There are two overriding statutory purposes ignored by the Second Circuit's reading of SORNA: Congress's aim of monitoring sex offenders in the community, to protect the public, and Congress's goal of maintaining the preexisting state-federal balance, whereby states retain primary responsibility for registering and supervising state sex offenders.

SORNA's focus on offenders in the community runs throughout the law. 42 U.S.C. § 16915(a) specifically excludes from the registration period "any time the sex offender is in custody or civilly committed." Offenders in custody are not notified of their registration obligations until "shortly" before release. 42 U.S.C. § 16917(a). Section 16913 requires registration in each place an individual resides, works, or is a student, plainly contemplating a person out of prison who might live, work and study in different places. Offenders are periodically required to report in person, which would be impossible during incarceration. *See* 42 U.S.C. §§ 16913, 16916. These provisions uniformly evince the Congressional presupposition that offenders will be out of custody when participating in these registries.

Sex offender registration schemes like SORNA focus on offenders who are out of custody for an obvious reason: there is no need to establish an elaborate set of registration rules to monitor offenders in custody, because they are already thoroughly monitored and restricted by the fact of being incarcerated. As the Attorney General's Guidelines state, registration requirements

> generally presuppose the case of a sex offender who is free in the community. Where a sex offender is confined, the public is protected against the risk of his reoffending in a more direct way, and more certain means are available for tracking his whereabouts.

73 Fed. Reg. 38,068. From a state's standpoint, requiring incarcerated individuals to participate in its community sex offender registry program is entirely unnecessary and burdensome.

The Second Circuit's interpretation of § 2250(a) also disrupts the traditional state-federal balance that Congress sought to preserve in enacting SORNA. There is no federal police power and it is not clear what, if any, authority the federal government would have over state sex offenders who reside continuously in one state. *See United States v. Kebodeaux*, 133 S.

Ct. 2496, 2507 (2013) (Roberts, J., concurring). States have always maintained primary responsibility for registering and monitoring state sex offenders, like Petitioner. SORNA should not be read to disrupt this balance by imposing federal criminal liability on state sex offenders who reside continuously in one state following their release from custody, especially since there is no obvious federal interest in such a case.

POINT II

Liability for a Violation of 18 U.S.C. § 2250(a) Should Not Be Predicated on Involuntary or Custodial Movement

The Second Circuit also erroneously concluded that a custodial prison transfer could constitute "travel" within the meaning of § 2250(a) and declined to require proof of voluntary conduct to satisfy this element, in contravention of fundamental precepts of criminal law.

The second element of 18 U.S.C. § 2250(a) – interstate travel – is, in the words of this Court, "the very conduct at which Congress took aim" in enacting the law. *Carr*, 560 U.S. at 454. Interstate travel is a critical component of the actus reus of the federal crime and a specific aspect of "the harm Congress sought to punish." *Id.*

Because interstate travel is an essential component of a violation of § 2250(a), the question becomes what "travel" means in this context. Considering the statutory text and legislative history of SORNA, and background principles of criminal law, Petitioner argued that the Second Circuit should find that the requisite travel must be noncustodial and voluntary. However, the Circuit held that a custodial prison transfer could constitute "travel" and declined to hold that any travel must be voluntary. Both conclusions were wrong.

SORNA does not define the term "travels," as used in 18 U.S.C. § 2250(a)(2)(B). To interpret statutory provisions, this Court begins with the words' ordinary meaning. *See Smith*

v. United States, 508 U.S. 223, 228 (1993). At the same time, it considers the context, including surrounding provisions and the structure, history and purpose of the statute. *See, e.g., Abramski v. United States*, 135 S. St. 2259, 2267 (2014). "Statutory language 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350 (2012)); *see also Yates v. United States*, 135 S. Ct. 1074, 1084-85 (2015); *Johnson v. United States*, 559 U.S. 133, 139 (2010).

These general rules of statutory construction have been repeatedly applied to SORNA, whose provisions must be interpreted with reference to one another and the statutory scheme as a whole. *See, e.g., United States v. Robbins*, 729 F.3d 131, 134 (2d Cir. 2013); *United States v. Alexander*, 802 F.3d 1134, 1140 (10th Cir. 2015).

In interpreting § 2250(a), this Court should be guided by its recent decisions reading statutory words with a view towards their overall context. In *Yates v. United States*, for example, this Court held that a commercial fisherman could not be liable under a provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519, for disposing of illegally harvested fish to conceal that they had been caught. Section 1519 criminalizes altering, destroying, mutilating, or concealing any "tangible object," and the Court conceded that a fish was literally a tangible object. 135 S. Ct. at 1079. Nonetheless, based on the statutory context, the Court limited the definition of "tangible object" to one that is used to record or preserve information, and rejected liability for the fisherman. *Id.* at 1079, 1083.

Just as in *Yates*, this Court should find that meaning of "travels" is informed and limited by its statutory context: when § 2250(a) criminalizes "travel[] in interstate or foreign commerce," the overall statutory scheme makes clear that this means community, not custodial, travel. SORNA's focus on sex offenders who have been released from custody and are at large in the community runs throughout the statutory text and legislative history, as described above. The law clearly targets offenders in the community, not in custody.

Considering this context and background, it is clear that § 2250(a)'s interstate travel requirement was not intended to be met by the custodial movement of prisoners like Petitioner. Instead, when that provision of SORNA references travel, it is intended to apply only to the travel of individuals who have already been released into the community – not to those completing an interstate prison transfer.

Even apart from the statutory text and intent of SORNA, this Court should find that custodial movement cannot give rise to criminal liability because such movement is not truly voluntary. With extremely limited exceptions, criminal liability must be premised on voluntary action. The requirement of voluntary action is one of the basic principles of criminal common law, the background against which Congress legislates. *See United States v. Nucci*, 364 F.3d 419, 423 (2d Cir. 2004). As a result, courts routinely read voluntariness requirements into federal criminal statutes even if they are not stated explicitly. *See, e.g.*, *United States v. Rodriguez*, 416 F.3d 123, 125 (2d Cir. 2005) (requiring voluntary reentry attempt under 8 U.S.C. § 1326, though term "voluntary" is not in statute); *United States v. Gaines*, 295 F.3d 293, 302 (2d Cir. 2002) (interpreting 18 U.S.C. § 922(g)(1) to require voluntary possession of a firearm). Courts have read such a voluntariness requirement into statutes that require interstate travel or the use of

interstate facilities. *See, e.g., United States v. Gibson Specialty Co.*, 507 F.2d 446, 449 (9th Cir. 1974) (stating that Travel Act requires proof of the voluntary use of interstate facilities); *United States v. Gebhart*, 441 F.2d 1261, 1263 (6th Cir. 1971) (requiring proof of voluntary travel in interstate commerce or the voluntary use of the facilities of interstate commerce).

Considering this fundamental tenet of criminal law, a critical component of the conduct comprising a § 2250(a) violation – interstate travel – must be voluntary, and the Second Circuit was wrong to decline to impose such a requirement.

POINT III

SORNA Improperly Delegates Legislative Authority to the Attorney General

Finally, the Court should find that the application of SORNA's registration requirements to offenders such as Petitioner, who were convicted of a sex offense prior to SORNA's enactment, violated the Nondelegation Doctrine.

Congress did not determine SORNA's applicability to individuals convicted of a sex offense prior to its enactment. Instead, 42 U.S.C. § 16913(d) delegated to the Attorney General the "authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act . . . ."

The authority to legislate is entrusted solely to Congress. U.S. Const. Art. I §§ 1, 8. "Congress manifestly is not permitted to abdicate or transfer to others the legislative functions" with which it is vested. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). This "nondelegation doctrine is rooted in the principle of separation of powers . . . ." *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

While the Nondelegation Doctrine does not prevent Congress from "obtaining the assistance of its coordinate Branches," it can do so only if it provides clear guidance. *Id.* at 372-73. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not forbidden delegation of legislative power.'" *Id.* at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928)).

In both *Panama Refining Co.* and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), this Court held that Congress had unconstitutionally authorized the Executive to make laws because it "had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom [it] delegated power." *Mistretta*, 488 U.S. at 374, n.7.

Similarly, in SORNA Congress failed to articulate any policy to guide the Attorney General in determining the law's applicability to pre-Act offenders. Congress gave no guidance as to how the Attorney General should exercise this delegated authority. Because of this lack of an intelligible principle, jurists have repeatedly questioned whether Congress could constitutionally make this delegation. For example, in his dissenting opinion in *Reynolds v. United States*, Justice Scalia questioned whether Congress could constitutionally take such action, noting this "sail[s] close to the wind with regard to the principle that legislative powers are nondelegable." 132 S. Ct. 975, 986 (2012); *see also United States v. Fuller*, 627 F.3d 499, 509 (2d Cir. 2010) (Raggi, J., concurring), *vacated on other grounds by Fuller v. United States*, 132 S. Ct. 1534 (2012); *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, concurring), *abrogated on other grounds by Reynolds v. United States*, 132 S. Ct. 975 (2012).

Because SORNA grants the Attorney General unfettered discretion to determine who is subject to criminal legislation without an "intelligible principle" to guide this discretion, it violates the nondelegation doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
September 20, 2017

Respectfully submitted,
Federal Defenders of New York, Inc.

By: _____

Sarah Baumgartel, Esq.
Attorney for Herman Avery Gundy
52 Duane Street, 10th Floor
New York, New York 10007
Tel.: (212) 417-8772

TABLE OF CONTENTS TO THE APPENDIX

Summary Order of the United States
Court of Appeals for the Second Circuit,
United States v. Gundy, No. 16-1829-cr A000001

Opinion of the United States
Court of Appeals for the Second Circuit,
United States v. Gundy, No. 13-3679-cr A000005

Memorandum and Order of the United States
District Court for the Southern District of New York,
United States v. Gundy, 13 Cr. 8 (JPO) A000027

Opinion and Order of the United States
District Court for the Southern District of New York,
United States v. Gundy, 13 Cr. 8 (JPO) A000050

Judgment in a Criminal Case,
United States District Court for the Southern of New York
United States v. Gundy, 13 Cr. 8 (JPO) A000062

Amended Judgment in a Criminal Case,
United States District Court for the Southern of New York
United States v. Gundy, 13 Cr. 8 (JPO) A000068

Second Amended Judgment in a Criminal Case,
United States District Court for the Southern of New York
United States v. Gundy, 13 Cr. 8 (JPO) A000074

Transcript of Proceedings and Oral Ruling,
United States v. Gundy, 13 Cr. 8 (JPO),
United States District Court for the Southern District of New York A000080

16-1829
United States v. Gundy

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of June, two thousand seventeen.

PRESENT:

RICHARD C. WESLEY,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 16-1829

HERMAN AVERY GUNDY, AKA HERMAN GRUNDY,

Defendant-Appellant.

FOR APPELLANT: SARAH BAUMGARTEL, Federal Defenders of New York, Inc., New York, NY.

FOR APPELLEE: EMIL J. BOVE III (Brendan F. Quigley, Brian R. Blais, *on the brief*), Assistant United

States Attorneys, *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Oetken, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the June 16, 2016 judgment of the District Court is **AFFIRMED**.

Defendant-appellant Herman Gundy appeals his conviction and sentence, following a bench trial on stipulated facts, for one count of failing to register as a sex offender after traveling in interstate commerce, in violation of the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250(a). We assume the parties' familiarity with the underlying facts and the procedural history of the case, to which we refer only as necessary to explain our decision to affirm.

While serving a federal sentence for violating Maryland Criminal Law § 3-306, Sexual Offense in the Second Degree, during his supervised release for a prior federal offense, Gundy was transferred from Maryland to a federal prison in Pennsylvania. *See United States v. Gundy*, 804 F.3d 140, 143 (2d Cir. 2015). As he approached the end of his federal sentence, Gundy authorized the Department of Justice to make arrangements for his move to community-based custody. He was ordered to be transferred to the Bronx Residential Re-Entry Center, a halfway house in New York, and he was granted a furlough to travel unescorted on a commercial bus on July 17, 2012, from Pennsylvania to the Bronx. Gundy arrived at the Re-Entry Center as planned, and, on August 27, 2012, was released from federal custody there to a private residence in the Bronx. Gundy did not register as a sex offender in either Maryland or New York, as state law required, and was arrested and charged under 18 U.S.C. § 2250. *Id.* at 144. After the District Court granted Gundy's motion to dismiss the prosecution for the absence of a trigger for SORNA's registration requirement, this Court reversed the dismissal and

reinstated the indictment, holding that the requirement was triggered because Gundy was "required to register" under SORNA no later than August 1, 2008. *See id.* at 145.

Upon the indictment's reinstatement, Gundy renewed his motion to dismiss on the basis that the interstate travel requirement of the statute was not satisfied because he was still in custody when he traveled from Pennsylvania to the Bronx. The District Court denied the motion, holding that the statute did not include an exception to the interstate travel element based on a defendant's custodial status. The District Court also held that, even if the statute did include a voluntariness or *mens rea* requirement, the allegations of the indictment were sufficient for that issue to be resolved at trial.

A bench trial followed on stipulated facts. The District Court found that each element of the offense had been proven beyond a reasonable doubt, including the interstate travel element and any voluntariness or *mens rea* requirement that may apply, and thus found Gundy guilty of violating § 2250. Following a sentencing hearing, the District Court entered judgment imposing a sentence of time served and a five-year term of supervised release. Gundy now appeals from that judgment.

Section 2250(a) imposes criminal liability on anyone who (1) is required to register under SORNA; (2) travels in interstate or foreign commerce; and (3) knowingly fails to register or update a required registration. 18 U.S.C. § 2250(a). We held in our consideration of Gundy's earlier appeal that Gundy satisfies the first requirement. There is no dispute that he knowingly failed to register, thus satisfying the third requirement. On appeal, Gundy asks us to read in an exception to the second requirement, travel in interstate commerce, for a defendant who crosses state lines while in federal custody. He contends that holding otherwise would violate the usual requirement of criminal law that criminal acts be committed voluntarily. The parties also dispute whether, on the stipulated facts and conclusions of the District Court following the bench trial, Gundy's travel from Pennsylvania to New York was voluntary.

We decline to reach Gundy's argument regarding the interpretation of § 2250(a).[1] Assuming *arguendo* that Gundy is correct and that the travel element contains an implicit voluntariness requirement, that requirement is easily met on the facts of this case. Although Gundy remained technically in federal custody when traveling to the halfway house in New York, the stipulated facts at trial are sufficient to support the District Court's finding that Gundy's travel was voluntary. On the basis of those facts, the District Court was free to conclude that Gundy made the trip in question willingly, as he authorized the initial transfer process and then traveled by bus to New York on his own recognizance. *See United States v. Pierce*, 224 F.3d 158, 164 (2d Cir. 2000) (noting that standard of review for sufficiency of the evidence is the same in a bench trial as a jury trial). We need not and do not reach the question of statutory interpretation because, even assuming Gundy is correct that interstate travel in § 2250(a) is limited to voluntary travel, the District Court reasonably found that the travel here was voluntary.

* * *

We have considered Gundy's remaining arguments and find them to be without merit.[2] Accordingly, we **AFFIRM** the judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

[1] To the extent Gundy attempts to present his case as two separate arguments—one based on voluntariness, and one based on a lack of congressional "focus" on sex offenders in custody (supporting the creation of a *per se* custodial travel exemption)—we are unpersuaded. Gundy himself repeatedly blends these arguments, *see, e.g.*, Appellant's Br. 1, 11, and he provides us with no real reason to look to look past the statute's text to other expressions of congressional intent except for his stated concern about the voluntariness of custodial travel.

[2] This includes Gundy's argument—foreclosed by *United States v. Guzman*, 591 F.3d 83, 91-93 (2d Cir. 2010), and made only for preservation purposes—that SORNA violates antidelegation principles.

13-3679-cr
United States v. Gundy

United States Court of Appeals
FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: October 28, 2014 Decided: September 14, 2015)

Docket No. 13-3679-cr

UNITED STATES OF AMERICA,

Appellant,

–v.–

HERMAN AVERY GUNDY, A/K/A HERMAN GRUNDY,

Defendant-Appellee.

B e f o r e :

KATZMANN, *Chief Judge*, HALL and CARNEY, *Circuit Judges*.

The United States appeals from orders of the United States District Court for the Southern District of New York (J. Paul Oetken, *Judge*) dismissing the January 7, 2013 Indictment against Defendant-Appellee Herman Avery Gundy and denying its motion for reconsideration of the dismissal. The federal Sex Offender Registration and Notification Act makes it a crime for a person who is

"required to register" under the Act to travel interstate and then knowingly fail to register or update his or her registration. 18 U.S.C. § 2250(a). The District Court dismissed the Indictment for failure to state an offense on the ground that the interstate travel charged in the Indictment occurred before Gundy was required to register. We hold that Gundy was a person "required to register" within the meaning of the Act from before the time of the charged interstate travel, and thus we REVERSE the District Court's order of dismissal. We REMAND the cause to the District Court for reinstatement of the Indictment and for further proceedings.

BRENDAN F. QUIGLEY, Assistant United States Attorney (Emil J. Bove III and Justin Anderson, Assistant United States Attorneys, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, NY, *for Appellant*.

SARAH BAUMGARTEL (Yuanchung Lee, *on the brief*), Federal Defenders of New York, Inc., Appeals Bureau, New York, NY, *for Defendant-Appellee*.

SUSAN L. CARNEY, *Circuit Judge*:

The United States appeals from orders of the United States District Court for the Southern District of New York (J. Paul Oetken, *Judge*) dismissing the January 7, 2013 Indictment against Defendant-Appellee Herman Avery Gundy and denying its motion for reconsideration of the dismissal. The Indictment charged Gundy with a violation of the Sex Offender Registration and Notification Act ("SORNA" or the "Act"), which makes it a federal crime for a

person who (1) "is required to register under [SORNA]," and (2) "travels in interstate or foreign commerce," to then (3) "knowingly fail[] to register or update a registration as required by [SORNA]." 18 U.S.C. § 2250(a); *see Carr v. United States*, 560 U.S. 438, 446 (2010) (explaining that the elements must be satisfied in sequence). This case requires us to decide when a person is "required to register" within the meaning of SORNA. The District Court, reasoning that Gundy was not "required to register" until shortly before his release from custody and thus after the interstate travel charged in the Indictment, held that Gundy could not have violated § 2250(a). Because we disagree with the District Court's conclusion that Gundy was not "required to register" until after the charged interstate travel, we REVERSE the District Court's order dismissing the Indictment and REMAND the cause to the District Court for reinstatement of the Indictment and for further proceedings.

BACKGROUND

A. The Sex Offender Registration and Notification Act

The federal government has set national standards for sex offender registration and notification since 1994, when it first required states to adopt

registration laws as a condition for receiving federal law enforcement funds. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 2038, 2038-42 (1994) (repealed 2006); *see also* Final Guidelines, 73 Fed. Reg. 38,030 (July 2, 2008). The Sex Offender Registration and Notification Act, which was enacted on July 27, 2006, *see* Pub. L. No. 109-248, 120 Stat. 590, was designed to improve the existing system by "mak[ing] more uniform what had," until that point, "remained a patchwork of federal and 50 individual state registration systems, with loopholes and deficiencies that had resulted in an estimated 100,000 sex offenders becoming missing or lost." *United States v. Kebodeaux*, 133 S. Ct. 2496, 2505 (2013) (citations and internal quotation marks omitted). Among other things, the Act created the National Sex Offender Registry, *see* 42 U.S.C. § 16919; imposed new guidelines on the states for the maintenance of registries, *see id.* §§ 16912, 16914; and imposed new registration requirements on offenders, *see id.* §§ 16913-16— while repealing much of the then-existing registration regime, *see id.* §§ 14071-73 (2006).

To promote offenders' compliance with the new registration requirements, SORNA made it a federal crime to fail to register or update one's registration as

required by the Act under certain circumstances. In relevant part, the criminal law provides as follows:

> (a) In general.—Whoever—
> (1) is required to register under [SORNA];
> (2) . . .
> (B) travels in interstate or foreign commerce . . . ; and
> (3) knowingly fails to register or update a registration as required by [SORNA];
> shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250.[1]

The particular civil registration requirements upon which criminal liability under § 2250(a) depends are set out at 42 U.S.C. § 16913. *See Reynolds v. United States*, 132 S. Ct. 975, 978-79 (2012); *see also United States v. Guzman*, 591 F.3d 83, 90 (2d Cir. 2010) (explaining that, "without § 16913, § 2250 has no substance"

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[1] Section 2250(a) provides in full:

> (a) In general.—Whoever—
> (1) is required to register under the Sex Offender Registration and Notification Act;
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
> shall be fined under this title or imprisoned not more than 10 years, or both.

(internal quotation marks omitted)). Subsection (a) of § 16913 contains the core registration mandate. It provides:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

42 U.S.C. § 16913(a). Subsection (b) governs the timing of "Initial registration," stipulating that "[t]he sex offender shall initially register—(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." *Id.* § 16913(b). Subsection (c) sets the terms under which a sex offender must update his or her registration, requiring a sex offender to report within three business days—in person and in at least one registration jurisdiction—any "change of name, residence, employment, or student status." *Id.* § 16913(c).

The duration of these registration requirements is specified in 42 U.S.C. § 16915: The "full registration period" is fifteen years for a statutorily defined "tier I" sex offender, twenty-five years for a "tier II" sex offender, and the life of

the offender for a "tier III" offender. 42 U.S.C. § 16915(a); *see also id.* § 16911(2)-(4) (defining tiers of sex offenders). The period of required registration is reduced for those offenders who maintain "clean record[s]" for a sufficient number of years. *Id.* § 16915(b).

Rather than determine by statute what retroactive application to give the registration requirements, Congress vested in the Attorney General "the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of [SORNA] or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d). Since SORNA's enactment, the Attorney General—in interim and final rules and proposed and final guidelines published between 2007 and 2010[2]—has specified that the Act's requirements apply to all sex offenders whose convictions predate the enactment of the Act, even in jurisdictions that have yet to implement it.[3] We have held that SORNA

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[2] *See* Interim Rule, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007) ("SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted."); Proposed Guidelines, 72 Fed. Reg. 30,210, 30,212 (May 30, 2007) ("SORNA's requirements apply to all sex offenders, including those whose convictions predate the enactment of the Act."); Final Guidelines, 73 Fed. Reg. 38,030, 38,063 (July 2, 2008) ("SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions' incorporation of the SORNA requirements into their programs."); Final Rule, 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010) (finalizing the interim rule "to eliminate any possible uncertainty or dispute concerning the scope of SORNA's application").

[3] SORNA does not require registration, however, by offenders who "have been in the

became applicable to pre-Act offenders at the latest when the Attorney General's final guidelines took effect. *See United States v. Lott*, 750 F.3d 214, 217 (2d Cir. 2014). This occurred on August 1, 2008, thirty days after the final guidelines were published. *See* 5 U.S.C. § 553(d) (providing that, subject to certain exceptions not applicable here, "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date").[4]

B. Factual Basis for Gundy's Indictment

In October 2005, Herman Gundy was convicted of violating Maryland Criminal Law § 3-306, Sexual Offense in the Second Degree. He was sentenced to twenty years' imprisonment (with ten years suspended), to be followed by five years' probation. When he committed the offense that was the basis for his

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community for a greater amount of time than the registration period required by SORNA." 73 Fed. Reg. at 38,046-47.

[4] The guidelines themselves identify their "Effective Date" as July 2, 2008, the date they were published in the Federal Register. *See* 73 Fed. Reg. at 38,030. But 5 U.S.C. § 553(d) creates an exception to the thirty-day prior publication requirement only for "(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule." None of these exceptions applies: The final guidelines do not grant or recognize an exemption or relieve a restriction. They are substantive, not interpretive, rules. *See Lott*, 750 F.3d at 217-19. And the Attorney General "provided no statement of reasons to establish 'good cause.'" *United States v. Utesch*, 596 F.3d 302, 311 n.8 (6th Cir. 2010). Indeed, in these proceedings, the government itself has conceded that the effective date of the final guidelines was August 1, 2008. *See* Appellant's Br. 20 n.4.

Maryland conviction, Gundy was already subject to the supervision of the United States District Court for the District of Maryland in relation to an earlier federal conviction. Committing the Maryland offense violated the terms of his federal supervised release. In March 2006, Gundy pleaded guilty to the supervised release violation and was sentenced to twenty-four months' imprisonment for that offense, to be served consecutively to the Maryland sentence.

About four and a half years later, in November 2010, Gundy was transferred from the custody of the State of Maryland to the custody of the Federal Bureau of Prisons to serve his federal sentence for violating his supervised release. But he remained in Maryland, apparently still in a state facility notwithstanding his federal custody.

Federal authorities eventually transferred Gundy to FCI Schuylkill in Minersville, Pennsylvania. In March 2012, toward the end of his federal sentence and in preparation for his release, Gundy signed a "Community Based Program Agreement" authorizing the Department of Justice to make arrangements for his transition into community-based custody. Three months later, Gundy was ordered to be transferred to the Bronx Residential Re-Entry Center, a halfway

house in New York. At his request, Gundy was granted a furlough to travel, unescorted, on July 17, 2012, from FCI Schuylkill to the Bronx. In his furlough application, Gundy acknowledged, among other things:

> I understand that if approved, I am authorized to be only in the area of the destination shown above and at ordinary stopovers or points on a direct route to or from that destination. I understand that my furlough only extends the limits of my confinement and that I remain in the custody of the Attorney General of the United States. If I fail to remain within the extended limits of this confinement, it shall be deemed as escape from the custody of the Attorney General . . . .

Ex. H to Decl. of Assistant U.S. Att'y Emil J. Bove III.

Gundy traveled from FCI Schuylkill to the Bronx Residential Re-Entry Center on July 17 as planned. On August 27, 2012, after completing his stay in the halfway house, Gundy was released from federal custody to a residence in the Bronx.

The government contends that, contrary to SORNA's requirements, Gundy registered in neither Maryland nor New York. On January 7, 2013, a grand jury returned an Indictment against Gundy in the United States District Court for the Southern District of New York charging him, under 18 U.S.C. § 2250, with being required to register under SORNA; traveling interstate from Pennsylvania to New York; and then failing to register as required.

C. District Court Proceedings

In March 2013, Gundy moved in the District Court to dismiss the Indictment for failure to state an offense. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). Gundy argued principally that he was required to register only after the alleged interstate travel between Pennsylvania and New York, and thus could not have violated § 2250(a), the elements of which must be satisfied sequentially. The District Court agreed with Gundy and granted his motion.

In granting the motion, the court rejected the government's contention that Gundy, who was convicted of a covered crime before SORNA's enactment in 2006, was "required to register" as soon as SORNA became retroactive. The court interpreted 42 U.S.C. § 16913(b)(1)—which provides that a "sex offender shall initially register . . . before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement"—as demonstrating that Gundy was "required to register" under 18 U.S.C. § 2250(a)(1) only "shortly before he was released from custody in New York," and after he had traveled interstate, *United States v. Gundy*, No. 13 Crim. 8(JPO), 2013 WL 2247147, at *6, *13 (S.D.N.Y. May 22, 2013).

Accounting for the fact that the sentence Gundy was serving immediately before his release in New York was for violating the terms of his federal supervised release, and not for the Maryland sexual assault, the District Court held that the federal sentence was also "a sentence of imprisonment with respect to" Gundy's sex offense. *See id.* at *11-12. In a motion for reconsideration, the government argued for the first time that Gundy was nevertheless required to register at the latest before he completed his Maryland sentence pursuant to 42 U.S.C. § 16913(b)(1), because the language of the statute states that a sex offender must register "before completing *a* sentence of imprisonment," in the singular (emphasis added).

The District Court denied the government's motion, concluding that this argument was waived, but also rejecting it on the merits due to considerations of "statutory purpose and the rule of lenity." *United States v. Gundy*, No. 13 Crim. 8(JPO), 2013 WL 4838845, at *2-3, *6 (S.D.N.Y. Sept. 11, 2013). The government now appeals the court's orders.

DISCUSSION

Since the Indictment's dismissal raises questions of law, our review is *de novo*. *See United States v. Alfonso*, 143 F.3d 772, 775 (2d Cir. 1998).

The government argues that the Indictment should be reinstated because Gundy was "required to register" under SORNA from the moment he was designated a "sex offender" under the Act—at the latest, August 1, 2008, when the Attorney General's final guidelines on retroactivity became effective. According to the government, § 16913(b)—upon which the District Court principally relied—"does not purport to determine when an individual incurs an obligation to register under SORNA, [but] only when there has been a failure to make an initial registration as required by the statute." Appellant's Br. 21. The government argues, in the alternative, that even accepting Gundy's contrary contention that § 16913(b) specifies when a sex offender first is required to register, Gundy would have been required to register at the latest as of November 30, 2010, when he was released from Maryland custody into the custody of the Federal Bureau of Prisons. Under either interpretation, Gundy became a person "required to register" before his July 17, 2012 trip from Pennsylvania to New York.

We agree with the government's first argument that Gundy was a person "required to register" from the time SORNA became retroactive. A person is "required to register" under SORNA "[o]nce [that] person becomes subject to SORNA's registration requirements." *Carr*, 560 U.S. at 447. For Gundy, who was convicted of a sex offense in 2005, before SORNA's July 2006 effective date, the registration requirements attached at the latest on August 1, 2008, the effective date of the Attorney General's final guidelines, *see Lott*, 750 F.3d at 217; 5 U.S.C. § 553(d).

Gundy contends that he was not subject to SORNA's registration requirements at all until shortly before his 2012 release from federal custody. In urging this position, he relies principally on § 16913(b), which provides (as relevant here) that a "sex offender shall initially register . . . before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 42 U.S.C. § 16913(b)(1). Gundy points to subsection (b)'s reference to "initial" registration and reasons that a person cannot be "required to register" before that person is required *initially* to register.

Although § 16913(b) undoubtedly regulates initial registration, we disagree that this means that § 16913(b) also regulates when registration

requirements attach. It is our view that § 16913(b) is most naturally read to set deadlines for initial registration, not to establish the conditions that make registration mandatory. The provision is worded in terms of cutoff dates rather than beginning points: Thus, subsections (b)(1) and (2) direct that an offender sentenced to a term of imprisonment must initially register "*before* completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement," and that an offender not sentenced to a term of imprisonment must register "*not later than 3 business days after* being sentenced for that offense." 42 U.S.C. § 16913(b)(1), (2) (emphases added).

Gundy does not dispute this reading of the statute. Instead, he argues that there can be no "require[ment] to register" until an offender has reached a registration deadline. But this argument gives insufficient weight to the fact that § 2250(a) treats being "required to register" and "fail[ing] to register or update a registration as required" as separate and distinct elements of the criminal offense. 18 U.S.C. § 2250(a)(1), (3). The temporal relationship between these elements—the first necessarily is satisfied before the second, *see Carr*, 560 U.S. at 446—establishes that a person can be "subject to SORNA's registration requirements," *id.* at 447, before he or she is subject to immediate sanction for

"fail[ing] to register," 18 U.S.C. § 2250(a)(3).[5] Section 16913(b) does not regulate when registration requirements attach.

Gundy argues, *inter alia*, that the government's interpretation of when registration requirements attach undermines SORNA's purposes, contradicts Supreme Court precedent, and ignores other provisions of the Act. We find none of his arguments persuasive.

SORNA was enacted in part "to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." *Carr*, 560 U.S. at 455. According to Gundy, permitting sex offenders to satisfy their initial registration requirements by initially registering long before their release would, contrary to this purpose, enable "offenders . . . easily [to] abscond following their release from prison, before they had registered their community address." Appellee's Br. 28. This argument ignores that a sex offender, having initially registered, remains subject to SORNA's registration requirements and is required "not later than 3 business days" after a change in residence to update his or her registration

[5] Gundy's argument is also in tension with his assertion that he was required to register "shortly before" his release from custody. Were the government "simply wrong in asserting that 'a person can be required to register under a statute for a period of time prior to that person's deadline for completing that registration process,'" Appellee's Br. 24 (quoting Appellant's Br. 23), there would be no period of time before the deadline—however "short"—during which a person would be subject to a registration obligation.

information. 42 U.S.C. § 16913(c). Such an offender who initially registers and is then released from custody is in a position similar to that of a sex offender who is not sentenced to a term of imprisonment and must initially register "not later than 3 business days after being sentenced for that offense." *Id.* § 16913(b)(2). In either case, the sex offender is "required to register"; should he or she leave the state of conviction and thereafter fail to register, a federal criminal penalty may be imposed. In contrast, were the Court to adopt Gundy's position that a sex offender is "required to register" only upon the arrival of the offender's initial registration deadline, an offender not sentenced to a prison term—and thus, in Gundy's view, "required to register" 3 business days after sentencing—would not be subject to a federal criminal penalty if he or she left the state on the day of sentencing and thereafter failed to register. The travel would have occurred before the offender was "required to register," precluding prosecution. *See Carr*, 560 U.S. at 446. This result certainly would run counter to SORNA's purpose.

Gundy's attempt to use *Carr v. United States*, 560 U.S. 438 (2010), to challenge the government's position is not persuasive. In *Carr*, the Supreme Court faced the question whether a defendant who had both been convicted of a sex offense and traveled interstate before SORNA's enactment could be

convicted under § 2250(a) for failure to register. *See id.* at 442. The Court concluded that he could not. *See id.* at 458. In reaching this conclusion, the Court agreed with the defendant that the three elements of the crime necessarily would have had to occur after SORNA's effective date, rejecting the suggestion that being "required to register under [SORNA]" was merely "shorthand" for the status of having been convicted of a sex offense covered by SORNA. *Id.* at 446-47 (internal quotation marks omitted).

Gundy charges that the government's position here runs afoul of the *Carr* Court's holding that being "required to register" under SORNA "denotes a more specific meaning than being among a class of sex offenders, or having a prior sex offense conviction." Appellee's Br. 20. But the government's position, and the one we adopt here, is not that the set of persons who are "required to register" is equivalent to the set of persons who been convicted of a sex offense. Rather, it is that a sex offender is "required to register" once he or she is "subject to" SORNA's registration requirements. This can occur only after SORNA's effective date, and after SORNA has been made applicable to that person. Gundy, for example, was convicted in 2005, before SORNA's effective date, and therefore was "required to register" not upon his conviction, but only once SORNA was

made retroactively applicable to him. Further, the period of required registration does not necessarily persist indefinitely. A person for whom the statutorily prescribed registration period is complete is no longer subject to SORNA's registration requirements, even as he or she remains among the class of statutorily defined sex offenders. *See* 42 U.S.C. § 16915; 73 Fed. Reg. at 38,046-47.

Gundy points to the fact that the state has a duty to inform a sex offender of the registration requirements only "shortly before" his or her release from custody, 42 U.S.C. § 16917(a), as another reason to conclude that Gundy could not have been a person "required to register" until shortly before his release from federal custody consecutive to his state custody. But we have emphasized that SORNA's requirements for the states and for sex offenders are not necessarily interdependent: In *United States v. Hester*, 589 F.3d 86 (2d Cir. 2009) (per curiam), we held that the defendant's duty to register under SORNA was dependent neither on his actual knowledge of SORNA's requirements nor on the state's implementation of SORNA, *see id.* at 91-93; the application of the registration requirements cited in § 2250(a)(1) did not hinge on whether the state had provided notice of those requirements, *see id.* at 92. And in any case, the timing of the state's duty to provide notice is not random: An offender who is "required

to register" under SORNA but does not register is not vulnerable to any punishment until after the time at which the state incurs a duty to provide notice. This is because an offender cannot have "fail[ed] to" satisfy any SORNA requirement applicable to him or her until the deadline for satisfying that requirement has passed; for a sex offender sentenced to a term of imprisonment, the initial registration deadline is when he or she "complet[es] a sentence of imprisonment with respect to the offense giving rise to the registration requirement," 42 U.S.C. § 16913(b)(1).[6] That Congress required states to provide notice to sex offenders only shortly before their release from custody fails to demonstrate that Congress did not intend for sex offenders to be persons "required to register" from an earlier stage.

Further, any suggestion that Gundy could not have been a person "required to register" beginning in 2008 because registration would have been impossible for him to accomplish while in custody must be rejected. The statute expressly requires an offender sentenced to imprisonment to initially register while still in custody. *See* 42 U.S.C. § 16913(b)(1) (requiring a sex offender to register "before completing a sentence of imprisonment"). And the nature of the

[6] Indeed, any offender designated as such based on a state law conviction does not violate § 2250(a)—and is not subject to *federal* criminal sanction—unless he or she fails to register after traveling interstate.

registration information that a sex offender must provide accounts for the possibility that a sex offender may not have a current place of employment or permanent residence. For example, § 16914(a) requires a sex offender to provide the name and address of any place where the sex offender "resides *or will reside*," or "is . . . *or will be*" an employee or student. *Id.* § 16914(a)(3)-(5) (emphases added). Notably, it is only after initial registration, to "[k]eep[] the registration current," that a sex offender must "appear in person" to provide information, *id.* § 16913(c); and the particular requirement to keep one's registration current in this way does not apply to sex offenders during any period of custody or civil commitment, *see id.* § 16915(a); 73 Fed. Reg. at 38,068.

In sum, Gundy was a person "required to register" under SORNA beginning at the latest on August 1, 2008, the effective date of the Attorney General's final guidelines. This date arrived well before his alleged travel from Pennsylvania to New York. The District Court thus erred in concluding that Gundy became a person "required to register" under SORNA only after traveling interstate.

Gundy urges us, to the extent we disagree with the District Court, to affirm the court's dismissal order on the alternative ground that the travel

charged in the Indictment does not amount to "interstate travel" within the meaning of § 2250(a)(2)(B). Gundy notes that by virtue of his one-day travel agreement with the federal government, he remained in the custody of the Federal Bureau of Prisons when he traveled from Pennsylvania to New York to take up his residence in the halfway house. As a result, he argues, his travel fell outside the purview of § 2250(a)(2)(B). Gundy raised this issue before the District Court, but the District Court did not reach it. We leave it to the court on remand to decide in the first instance whether dismissal of the Indictment is warranted on this other ground.

CONCLUSION

For the reasons above, we REVERSE the District Court's order dismissing the Indictment. We REMAND the cause to the District Court for reinstatement of the Indictment and for further proceedings consistent this opinion. Gundy's appeal from the District Court's order denying reconsideration is moot.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	13 Crim. 8 (JPO)
HERMAN AVERY GUNDY, Defendant.	:	MEMORANDUM AND ORDER

J. PAUL OETKEN, District Judge:

Defendant Herman Avery Gundy is charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250. Gundy has moved to dismiss the Indictment. For the reasons that follow, his motion is granted.

I. Background

On July 11, 1994, Gundy pleaded guilty in the Eastern District of Pennsylvania to one count of conspiracy to distribute cocaine base, in violation of 21 U.S.C. § 846 ("the Federal Conviction"). On February 5, 1996, he was sentenced to five years' imprisonment and five years' supervised release. In 2004, jurisdiction over Gundy was transferred from the Eastern District of Pennsylvania to the District of Maryland.

On October 3, 2005, Gundy entered an *Alford* plea in a Maryland state court to the crime of Sexual Offense in the Second Degree ("the Maryland Conviction"). That same day, he was sentenced in Maryland state court to 20 years' imprisonment and five years' probation, with 10 years of the 20-year sentence suspended.

On March 23, 2006, Gundy appeared in the United States District Court for the District of Maryland and admitted to a violation of his federal supervised release based on the Maryland

Conviction. He was sentenced to 24 months' imprisonment and the remainder of his supervised release was terminated. This sentence was to be served consecutively to his Maryland sentence.

On June 15, 2011, Gundy was transferred from the custody of Maryland to the custody of the Bureau of Prisons (BOP) to serve the sentence imposed by virtue of his violation of the terms of his supervised release. Ultimately, he was sent to FCI Schuylkill in Minersville, Pennsylvania.

On March 23, 2012, Gundy signed a "Community Based Program Agreement." The Agreement contemplated that he would become "a resident" of an unspecified "residential reentry center [RRC] or work release program." On May 8, 2012, he signed a form titled "Conditions of Furlough." On June 7, 2012, Gundy signed a "Furlough Application – Approval and Record," which indicated that the "[p]urpose of the visit" that he sought was "[p]lacement in [an] RRC" in the Bronx, New York. This application stated that the "Method of Transportation" would be "bus/taxi." On June 12, 2012, the warden of FCI Schuylkill approved Gundy's furlough. That day, the warden signed a "Transfer Order" authorizing Gundy's transfer from FCI Schuylkill to the Bronx Residential Re-Entry Center in the Bronx, New York ("the Bronx RRC"). Gundy acknowledged that:

> I understand that if approved, I am authorized to be only in the area of the destination shown above and at ordinary stopovers or points on a direct route to or from that destination. I understand that my furlough only extends the limits of my confinement and that I remain in the custody of the Attorney General of the United States.

The furlough conditions limited approval to Gundy's "remain[ing] in the legal custody of the U.S. Attorney General, in service to a term of imprisonment." The warden also signed a form stating that Gundy had been "authorized for unescorted commitment" to the Bronx RRC.

On July 17, 2012, Gundy traveled via Greyhound bus from Schuylkill Haven, Pennsylvania to New York City and reported to the Bronx RRC. He was released from the Bronx RRC on August 27, 2012. Upon being released from the Bronx RRC, Gundy remained in the Bronx. He did not register as a sex offender in either New York or Maryland.

On September 13, 2012, Maryland issued a warrant for Gundy's arrest based on violation of the conditions of his probation relating to the Maryland Conviction. On October 24, 2012, law enforcement personnel arrested Gundy in the Bronx and transferred him to the custody of Maryland. Gundy was later transferred to the custody of the BOP. On January 7, 2012, Gundy was charged in this District with one count of violating 18 U.S.C. § 2250.

II. Standard of Review

"Since federal crimes are solely creatures of statute, a federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute." *United states v. Zahavi*, 12 Cr. 288, 2012 WL 5288743, at *1 (S.D.N.Y. Oct. 26, 2012) (quoting *United States v. Aleynikov*, 676 F.3d 71, 75-76 (2d Cir. 2012)); *see also* Fed. R. Crim. P. 12(b)(2) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue."). "An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992).

III. Discussion

A. SORNA

On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 ("the Walsh Act"), Pub. L. No. 109-248, 120 Stat. 587. Title I of the Walsh Act codified

SORNA, the declared purpose of which is to "protect the public from sex offenders and offenders against children . . . [by] establish[ing] a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. Congress's principal purpose in enacting SORNA was "to make sure sex offenders could not avoid all registration requirements just by moving to another state." *United States v. Guzman*, 591 F.3d 83, 91 (2d Cir. 2010). As the Second Circuit has explained, "[r]equiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines." *Id.*

Title 18, United States Code, Section 2250(a) makes it a federal crime for certain sex offenders to violate SORNA's registration requirements. Section 2250 provides:

> (a) **In General.**— Whoever—
>
> (1) is required to register under [SORNA];
>
> (2)
>
> (A) is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by [SORNA];
>
> shall be fined under this title or imprisoned not more than 10 years, or both.
>
> (b) **Affirmative Defense.**— In a prosecution for a violation under subsection (a), it is an affirmative defense that—

> (1) uncontrollable circumstances prevented the individual from complying;
>
> (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and
>
> (3) the individual complied as soon as such circumstances ceased to exist.

Read together, the subsections of § 2250 create criminal liability when the Government can prove three elements: (1) the defendant was required to register under SORNA; (2) the defendant traveled in interstate or foreign commerce; and (3) the defendant knowingly failed to register or update a registration as required by SORNA. "For a defendant to violate this provision . . . the statute's three elements must be satisfied in sequence, culminating in a post-SORNA failure to register." *Carr v. United States*, 130 S. Ct. 2229, 2235 (2010). Thus if a sex offender travels in interstate commerce and then fails to register before becoming subject to SORNA's registration requirements, he cannot be found guilty for violating § 2250(a).

In relevant part, SORNA's registration requirements are set forth in 18 U.S.C. § 16913:

> (a) **In general**
>
> > A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.
>
> (b) **Initial registration**
>
> > The sex offender shall initially register—
> >
> > > (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

> (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) **Keeping the registration current**

> A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) **Initial registration of sex offenders unable to comply with subsection (b)**

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

"Absent a valid rule by the Attorney General, SORNA is not retroactive to defendants . . . who were convicted of sex offenses requiring them to register before July 27, 2006." *United States v. Stevenson*, 676 F.3d 557, 560 (6th Cir. 2012); *see also Reynolds v. United States*, 132 S. Ct. 975, 984 (2012) ("[T]he Act's registration requirements do not apply to pre-Act offenders until the Attorney General so specifies" pursuant to 42 U.S.C. § 16913); *United States v. Herbert*, 09 Cr. 438, 2009 WL 4110472, at *3 (N.D.N.Y. Nov. 20, 2009) ("Congress delegated to the Attorney General the authority to define the retroactive application of SORNA's provisions to sexual offenders whose convictions occurred before the passage of SORNA by Congress or before the full implementation of SORNA by a given jurisdiction." (citing 42 U.S.C. § 16913)).

On February 28, 2007, the Attorney General promulgated an interim regulation providing that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 72 Fed. Reg. 8894-01 ("the Interim SORNA Regulation"). On August 1, 2008, the "SMART Guidelines" went into effect. The Guidelines provided that:

> The applicability of the SORNA requirements is not limited to sex offenders whose predicate sex offense convictions occur following a jurisdiction's implementation of a conforming registration program. Rather, SORNA's requirements took effect when SORNA was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment.

73 Fed. Reg. 38,030. The Sixth Circuit has described the provenance of these guidelines:

> On May 30, 2007, the Attorney General published proposed guidelines from the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, called the SMART guidelines. The SMART guidelines stated that they were promulgated pursuant to the Attorney General's authority under 42 U.S.C. § 16912(b) to interpret and implement SORNA and restated the Attorney General's position that SORNA applied to all sex offenders, "including those whose convictions predate the enactment of the Act." 72 Fed. Reg. 30,210, 30,212. These guidelines were made open to comments until August 1, 2007. On July 2, 2008, the Attorney General published the final version of the SMART guidelines. 73 Fed. Reg. 38,030. In the final version, the Attorney General responded to comments regarding the issue of retroactivity, but kept the language the same. The final SMART guidelines stated their effective date as July 2, 2008, the date of publication.

Stevenson, 676 F.3d at 560; *see also United States v. Kidd*, 11 Cr. 20, 2011 WL 3352457, at *2-3 (E.D. Tenn. Aug. 3, 2011) *aff'd*, 12-5420, 2013 WL 870263 (6th Cir. Mar. 11, 2013). On January 28, 2011, without conceding that the Interim Rule and the SMART Guidelines were invalid, the Attorney General responded to further comments on the issue of retroactivity and

finalized the Interim Rule to dispel any doubts regarding SORNA's retroactivity. 75 Fed. Reg. 81,849, 81,850. This final regulation provided that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3 ("the Final SORNA Regulation"). The Attorney General stated that the effective date of this latest final rule was January 28, 2011.

B. Whether Gundy Was "Required to Register" Under SORNA When He Traveled in Interstate Commerce

Gundy argues that the Indictment must be dismissed because he was not "required to register" under SORNA prior to when he crossed state lines by traveling from Pennsylvania to New York. He adds that he became subject to this duty only when he completed his continuous term of incarceration—at which point he was in New York. The Government disputes Gundy's arguments, insisting that Gundy has been subject to SORNA's registration requirements since SORNA was rendered retroactive. In the alternative, the Government might argue that Gundy became required to register under SORNA upon the completion of the sentence that he served in Maryland's prisons as punishment for the Maryland Conviction.

As an initial matter, the Government's suggestion that *every* sex offender has been subject to SORNA's registration requirements, and "required to register" under SORNA, ever since the Attorney General issued regulations rendering SORNA retroactive, must be rejected. As the Supreme Court explained in *Carr* when presented with a similar argument:

> By its terms, the first element of § 2250(a) can only be satisfied when a person "is required to register *under the Sex Offender Registration and Notification Act*." § 2250(a)(1) (emphasis added). In an attempt to reconcile its preferred construction with the words of the statute, the Government insists that this language is merely "a shorthand way of identifying those persons who have a [sex-offense] conviction in the classes identified by SORNA." Brief for United States 19–20. To reach this conclusion, the

> Government observes that another provision of SORNA, 42 U.S.C. § 16913(a), states that the Act's registration requirements apply to "sex offender[s]." A "sex offender" is elsewhere defined as "an individual who was convicted of a sex offense." § 16911(1). Thus, as the Government would have it, Congress used 12 words and two implied cross-references to establish that the first element of § 2250(a) is that a person has been convicted of a sex offense. Such contortions can scarcely be called "shorthand." It is far more sensible to conclude that Congress meant the first precondition to § 2250 liability to be the one it listed first: a "require[ment] to register under [SORNA]."

130 S. Ct. at 2235-36. While *Carr* was focused on policing the line between pre-Act and post-Act offenders, its point is more generally applicable: the status of being required to register under SORNA is not coextensive with the status of being a sex offender. Further, *Carr* must be taken as a caution that this first requirement—which sets in motion the sequence of events leading to criminal liability under § 2250—plays an essential role in the statutory scheme and has content independent of being subject *in general* to one or another of SORNA's requirements. *See id.* at 2238 ("Had Congress intended to subject any unregistered state sex offender who has ever traveled in interstate commerce to federal prosecution under § 2250, it easily could have adopted language to that effect."). Moreover, as explained *infra*, the Government's broad view of when a sex offender becomes required to register is incompatible with the statutory text.

Because SORNA was passed on July 27, 2006 and Gundy entered his *Alford* plea to the crime of Sexual Offense in the Second Degree in October 3, 2005, he is a pre-Act offender. The applicability of SORNA's registration requirements is therefore governed by § 16913(d), which authorizes the Attorney General to issue retroactivity guidelines. The Attorney General first did so on February 28, 2007 with the Interim SORNA Regulation, which provided that SORNA's requirements "apply to all sex offenders," including pre-Act offenders. He then promulgated the SMART Guidelines, which became effective on August 1, 2008 and stated that "SORNA's

requirements took effect when SORNA was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment." Courts have split over whether the Interim SORNA Regulation survives scrutiny as administrative action, *see United States v. Reynolds*, 710 F.3d 498, 507 (3d Cir. 2013), but the SMART Guidelines have consistently survived such challenges, *see United States v. Kimble*, No. 11 Cr. 611, 2012 WL 5906863, at *2 (W.D.N.Y. Nov. 26, 2012) (finding that "the SMART Guidelines established that SORNA became effective in 2008"); *United States v. Mullins*, No. 11 Cr. 103, 2012 WL 3777067, at *3 (D. Vt. Aug. 29, 2012) ("This Court has already followed every circuit to reach the question in holding that the Attorney General exercised his authority to declare the law applied to pre-Act offenders . . . when the SMART Guidelines took effect.").

Thus, at least as of August 1, 2008, while still serving his Maryland sentence, Gundy became subject to § 2250 and § 16913. *Stevenson*, 676 F.3d at 565 ("[T]he SMART guidelines can and do have the force and effect of law, and they establish that SORNA became retroactive as of August 1, 2008."). Section 16913(a), however, distinguishes between normal registration requirements and the initial registration requirement, providing that "a sex offender shall register . . . in each jurisdiction where the offender resides . . . . [and] *for initial registration purposes only*, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence" (emphasis added). Tracking this distinction, § 16913(b) provides that a "sex offender *shall initially register*—(1) *before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement*" (emphasis added). SORNA thus describes a general registration requirement and provides for an initial registration scheme. Any authority exercised by the Attorney General pursuant to § 16913(d) would have rendered both § 16913(a) *and* § 16913(b) retroactive.

It would be nonsensical to conclude that Gundy was "required to register" under SORNA for purposes of § 2250(a)(1) *before* the date on which was required to "initially register" under § 16913. Therefore, a natural reading of § 16913(b)—together with other applicable law—suggests that Gundy's duty to register under SORNA did *not* become active on the date the SMART Guidelines took effect, on which date Gundy was serving his Maryland sentence. In other words, the SMART Guidelines did not render all pre-Act offenders immediately subject to a duty to register, such that the first element of SORNA will always be met for all pre- and post-Act sex offenders (also known as *all* sex offenders). Rather, as a pre-Act offender, Gundy became subject to SORNA's many requirements at least of the date the SMART Guidelines became effective. Those general requirements, however, include the specific requirement that a sex offender initially register "*before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement*" (emphasis added). This logic is confirmed by the SMART Guidelines, which explain that for sex offenders in prisoner populations at the time of SORNA's implementation, registration within the "normal SORNA time frame" means, as relevant here, "before release from imprisonment." 73 Fed. Reg. at 38,064. Gundy's sentence of imprisonment in Maryland for the sex offense to which he entered an *Alford* plea on October 3, 2005 plainly qualifies as a sentence covered by § 16913(b). Therefore, Gundy was not required to register under SORNA at least until the end of that prison term.

The critical question, however, is whether Gundy's period of incarceration in Maryland, Pennsylvania, and New York for violation of the terms of his federal supervised release qualifies under § 16913(b) as a "sentence of imprisonment *with respect to* the offense giving rise to the registration requirement." If so, then Gundy did not become subject to SORNA's registration requirement until he was released from custody inside New York and Gundy's motion must be

granted. If not, then Gundy became subject to SORNA's registration requirements at the end of the sentence imposed by Maryland's courts and his motion must be denied as to this argument.

The reading of § 16913(b) that best reconciles SORNA's text and purpose is that which *does* treat Gundy's sentence for violation of supervised release as "a sentence of imprisonment with respect to the offense giving rise to the registration requirement."

"As in any statutory construction case," analysis starts with the statutory text and "proceed[s] from the understanding that [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, No. 12-236, 2013 WL 2149791, at *5 (U.S. May 20, 2013) (internal quotation marks and citations omitted). "If the text of a statute is ambiguous, then [the Court] must construct an interpretation consistent with the primary purpose of the statute as a whole." *United States v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003). Where a statutory ambiguity persists after examination of a statute's text, structure, and purpose, the rule of lenity places a thumb on the scale against a finding of criminal liability. *See United States v. Santos*, 553 U.S. 507, 514 (2008). All three of these rules apply here.

As explained *supra*, § 16913(b) requires inmates to "initially register" after completing a prison term "*with respect to* the offense giving rise to the registration requirement." (emphasis added). This language, which is not addressed by SORNA's legislative history, is less than a model of clarity in specifying the required relationship between the "sentence of imprisonment" and the "offense giving rise to the registration requirement." The key term is "with respect to."

On the one hand, "with respect to" might be understood as "imposed as punishment for" the registration offense. On the other hand, "with respect to" might be understood in a broader sense as "relating to," "arising from," "regarding," or "in connection with." *See, e.g., American Heritage Dictionary* (4th ed. 2001) (defining "respect" as, *inter alia*, a verb that means "to relate

or refer to; concern"); *Oxford English Dictionary* (2d ed. 1989) (identifying "with respect to" as definition I.4.e and cross-referencing to I.7.b., which defines "with respect" as meaning, *inter alia*, "[w]ith reference or regard *to* something" (emphasis in original)); *see also id.* (offering many definitions of "respect" that emphasize the relational character of this term, such as "1. *To have respect to*: a. To have regard or relation to, or connexion with, something . . . . b. To have reference, to refer, to something . . . 2. *To have respect to*: a. To turn *to*, refer *to*, for information . . . c. To give heed, attention, or consideration *to* something; to have regard *to*; to take into account). Indeed, courts have made very different use of the term "with respect to." *See, e.g.*, *Magwood v. Patterson*, 130 S. Ct. 2788, 2806 (2010) (holding a habeas corpus application is "second or successive" for purposes of AEDPA where, "with respect to" a claim, the alleged error "could and should have" been raised in the first petition); *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705 n.4 (2d Cir. 2013) (examining circumstances under which a person "is a fiduciary with respect to a plan" under ERISA, and noting that when an entity acts with "dual roles," fiduciary duties are only implicated when it functions in its capacity as a fiduciary). The common thread across these opinions and definitions is that "with respect to" connotes a connection with or relationship to, though not necessarily or even usually a state of identity with, the object of the phrase.

In most cases, this ambiguity in the meaning of "with respect to" will not matter. If a sex offender serves a prison sentence for the offense that creates the duty to register, and is then released from custody, his duty is activated at the end of his time in prison. If that sex offender is later caught and convicted of another crime, the question whether he is obligated to register while in prison does not implicate the initial registration issue that the parties dispute in this case.

Gundy's situation, however, directly implicates the ambiguity in § 16913(b)'s reference to a "sentence of imprisonment *with respect to* the offense giving rise to the registration requirement" (emphasis added). Unlike most offenders– and unlike the typical offender that Congress and the Attorney General likely imagined when crafting the applicable law—Gundy completed a sentence of imprisonment for his Maryland sex offense and then *immediately* began a consecutive sentence of imprisonment for his violation of federal supervised release, a violation premised on the same underlying Maryland sex offense. This transition occurred while he was incarcerated in the same prison in Maryland; one day, he was in the same cell for a different reason. He was never released from prison. He was not even moved to a different prison, at least not initially. And the violation that caused his supervised release sentence consisted of exactly the same conduct that gives rise to his registration requirement. Gundy thus served back-to-back sentences for a single course of conduct—his sex offense—which simultaneously broke Maryland's criminal code and the terms of his supervised release.

On this fact pattern, the textual question is whether Gundy's time in prison for violating his supervised release in this manner qualifies as a sentence "with respect to" his Maryland sex offense. The answer is no if the text is read to mean "imposed as punishment for the offense giving rise to the registration requirement." The answer is yes if the text is read to mean "relating to," "arising from," or "in connection with" the offense giving rise to the registration requirement. The difference is thus all-important to Gundy, yet unsusceptible to resolution through analysis keyed only to the statute's plain language. The phrase "with respect to" is too ambiguous in this context to serve as the definitive predicate of Gundy's conviction.

A combination of statutory purpose and rule of lenity must therefore guide the outcome. Starting with purpose, SORNA's criminal provisions are "not a stand-alone response to the

problem of missing sex offenders." *Carr*, 130 S. Ct. at 2240. Rather, § 2250 is "embedded in a broader statutory scheme enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." *Id.* That scheme includes provisions "repealing several earlier federal laws that also (but less effectively) sought uniformity; [] setting forth comprehensive registration-system standards; [] making federal funding contingent on States' bringing their systems into compliance with those standards; [] requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and [] creating federal criminal sanctions applicable to those who violate the Act's registration requirements." *Reynolds*, 132 S. Ct. at 978.

Section 2250 thus plays a limited, though important, role in the larger SORNA scheme: "mak[ing] sure sex offenders could not avoid all registration requirements just by moving to another state." *Guzman*, 591 F.3d at 91. This is why "[t]he act of travel by a convicted sex offender may serve as a jurisdictional predicate for § 2250, but it is also, like the act of possession [under 18 U.S.C. § 922(g)], the very conduct at which Congress took aim." *Carr*, 130 S. Ct. at 2240. Thus, when sex offenders "use the channels of interstate commerce in evading a State's reach," their conduct implicates the animating purpose of SORNA's criminal provisions. *Id.* at 2238. Otherwise, however, Congress has given "the States primary responsibility for supervising and ensuring compliance among state sex offenders." *Id.*

Given that there is virtually no risk that a sex offender will fall through the cracks or go missing while incarcerated, it would make little sense to apply SORNA's registration requirements and criminal provisions to incarcerated individuals. In fact, Congress recognized that the public is adequately protected against sex offenders locked behind bars: this is why sex offenders are not required under § 16913(b) to initially register until the *end* of their post-

conviction carceral sentences. The Attorney General's SMART Guidelines confirm that "SORNA's registration requirements generally come into play *when sex offenders are released from imprisonment*, or when they are sentenced if the sentence does not involve imprisonment." 73 Fed. Reg. at 38,045 (emphasis added). The Guidelines add that "'imprisonment' as it is used in SORNA and these Guidelines refers to incarceration pursuant to a conviction, regardless of the nature of the institution in which the offender serves the sentence." *Id.*

This logic, which presupposes that there is little purpose to imposing a duty of initial registration on an incarcerated sex offender, appears again later in the SMART Guidelines:

> *Example 3*: A sex offender convicted in 1980 for an offense subject to lifetime registration under SORNA is released from imprisonment in 1990 but is not required to register at the time because the jurisdiction had not yet established a sex offender registration program. In 2010, following the jurisdiction's implementation of SORNA, the sex offender reenters the system because of conviction for a robbery. The jurisdiction will need to require the sex offender to register based on his 1980 conviction for a sex offense when he is released from imprisonment for the robbery offense. But it is not possible to carry out the initial registration procedure for the sex offender prior to his release from imprisonment for the registration offense – i.e., the sex offense for which he was convicted in 1980-because that time is past . . .
>
> . . . . In [cases like Example 3], the normal SORNA initial registration procedures and timing requirements will apply, but with the new offense substituting for the predicate registration offense as the basis for the time frame. In other words, such a sex offender must be initially registered in the manner specified in SORNA § 117(a) prior to release from imprisonment for the new offense that brought him back into the system, or within three business days of sentencing for the new offense in case of a non-incarcerative sentence.

73 Fed. Reg. at 38,063-64. Here, even though the offender would be incarcerated on a different offense than the offense giving rise to his duty to register, the Attorney General instructs states to view the initial registration requirement as one that arises at the *end* of the carceral sentence.

This provision reflects SORNA's basic logic, which does not treat incarcerated sex offenders as a group subject to a duty of initial registration during their time in prison.

A clear focus on offenders outside of custody runs through SORNA's text and its implementing regulations. Section 16913 requires offenders to register in each jurisdiction in which they reside, work, or study—requirements that all envision individuals outside of prison, free to go about their lives in multiple jurisdictions. Offenders are also required to periodically appear in person to keep their registration current, a mandate that further exemplifies Congress's presupposition that offenders with a duty to register are out of custody.

In the same vein, 42 U.S.C. § 16915(a) requires sex offenders to keep their "registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b) of this section." Offenders are thus relieved of the obligation to keep their registration current while incarcerated—yet another feature of SORNA's registration scheme that indicates Congress's focus on out-of-custody offenders and its recognition that the purposes of SORNA's criminal provisions are not ordinarily fulfilled by imposing registration requirements on incarcerated offenders. *See also* 42 U.S.C. § 16914 (requiring that as part of registration, offenders provide information of a sort associated with being out of custody rather than imprisoned, including license plate numbers for any cars they drive and information about where they work). The SMART Guidelines accordingly recognize that "[t]he proviso relating to custody or civil commitment" in § 16915(a) "reflects the fact that the SORNA procedures for keeping up the registration . . . generally presuppose the case of a sex offender who is free in the community." They do so, the Guidelines explain, because "[w]here a sex offender is confined, the public is protected against the risk of his reoffending in a more direct way, and more certain means are

available for tracking his whereabouts. Hence, SORNA does not require that jurisdictions apply the registration procedures applicable to sex offenders in the community during periods in which a sex offender is in custody or civilly committed." 73 Fed. Reg. at 38,068.

Thus, as manifested in its statutory text and implementing regulations, SORNA's purpose is not ordinarily served by imposing on inmates who have not been released from prison following their sex offense conviction a duty of initial registration.[1]

In many cases, such a requirement could lead to absurd results. Inmates are regularly moved between jurisdictions while in custody. Often, these transfers are orchestrated without their consent. Even if those inmates enjoyed an affirmative defense under § 2250(b) to liability under § 2250(a) for failure to register while imprisoned, the result would that a significant number of inmates have already satisfied elements (1) and (2) of § 2250 the moment they step past prison gates on their way to freedom. Failure to register within a short period would then perfect the § 2250 offense and return them to federal prison for an offense that, in the usual course, would implicate only the requirements of state sex offender registration schemes.

The Government's proposed interpretation of SORNA would thus result in a disruption of the state-federal balance contemplated by Congress, as it would federalize a large swath of post-custody failure-to-register offenses that do not reflect any uniquely federal power or concern. *See Carr*, 130 S. Ct. at 2238 (noting that Congress has given "the States primary responsibility for supervising and ensuring compliance among state sex offenders"); *see also United States v. Van Buren, Jr.*, No. 8 Cr. 198, 2008 WL 3414012, at *13 (N.D.N.Y. Aug. 8, 2008) *aff'd sub nom. United States v. Van Buren*, 599 F.3d 170 (2d Cir. 2010) (noting that

[1] A different question may arise if an inmate is released from custody, spends time in society, and is then returned to prison, but that question is not presented by this motion.

SORNA "does not offend traditional notions of federalism *because it addresses something each state does not have the power to accomplish* – track registered sexual offenders as they move from state to state." (emphasis added)). Moreover, this disruption in federalism would arise in a context shot through with questions of fundamental fairness, since in many cases the predicate act of interstate travel would have been imposed on an unwilling sex offender—who might well be excused from recognizing that failure to register in his new state violates SORNA, instead of state law. Ultimately, the Government's view would undercut the purpose and logic of SORNA's criminal liability provisions. As the Second Circuit recognized in *Guzman*, § 2250 is designed to make sure that sex offenders cannot dodge registration requirements by skipping from one state to another. 591 F.3d at 91. The interstate travel is thus the very act at which SORNA takes aim. *See Carr*, 130 S. Ct. at 2238-40. Where an inmate is in continuous carceral custody throughout his period of interstate travel, and is therefore being monitored by the government at every step along the way, it defies reason to view a post-release failure to register as an effort to "use the channels of interstate commerce in evading a State's reach." *Id.*

There is no reason to believe that all these considerations are any less decisive in Gundy's case. He was incarcerated continuously throughout his consecutive sentences. He did not present a danger that the government would lose him, that he would fall through the cracks, or that he would "use the channels of interstate commerce in evading a State's reach." *Carr*, 130 S. Ct. at 2238. He did not pose a danger to the community while in prison. He would have been required to register upon his release from custody wherever that release took place; there is no reason to believe that his failure to register after being released from custody in New York implicates SORNA's purposes any more than his failure to register would have done had he been released in Maryland. In either case, he could have been punished by the state government for

failing to register, or by the federal government if he subsequently moved in interstate commerce and knowingly failed to register as required by SORNA. In sum, it would not advance any core purpose of SORNA to conclude that Gundy's supervised release sentence was *not* a sentence of imprisonment "with respect to" his Maryland sex offense. SORNA is not designed to ensure that prisoners can be arrested for a federal crime in the very state where they are released from prison for the first time after serving a sentence "with respect to" their sex offense.[2]

This conclusion is bolstered by the rule of lenity. As Justice Scalia has explained:

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

Santos, 553 U.S. at 514. Section 16913 is sufficiently ambiguous that even experienced counsel would have been hard-pressed to explain to Gundy his potential liability for failing to register upon his release from the RRC in New York. Given that Congress has not spoken clearly, that the notice function associated with statutory criminal law was clouded by ambiguity, and that the purposes of SORNA weigh against the imposition of liability, a construction of SORNA that precludes liability here is required.

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[2] The Government raises the specter of a constitutional concern with this conclusion, since post-revocation penalties relate to the initial offense—and would raise an issue of double jeopardy if they were treated as punishment for the new criminal offense. *See Johnson v. United States*, 529 U.S. 694, 700 (2000). But that concern is misplaced. Acknowledging that Gundy's sentence for violation of his supervised release is a sentence "with respect to" his Maryland criminal offense is not the same as concluding that it constitutes punishment for that offense. In other words, the Court can recognize the reality of a relationship between Gundy's conduct in Maryland and his post-revocation penalties without implicating the double jeopardy issue noted in *Johnson*. As a result, there is no need to construe "with respect to" in the shadow of constitutional avoidance.

The SMART Guidelines do not alter – and in fact support – this conclusion. In the Guidelines, the Attorney General states that "jurisdictions must normally require that sex offenders be initially registered before release from imprisonment for the registration offense." He adds that, under § 117(a) of SORNA, "initial registration procedures are to be carried out 'shortly before release of the sex offender from custody' . . . . [J]urisdictions should implement this requirement in light of the underlying objectives of ensuring that sex offenders have their registration obligations in mind when they are released." 73 Fed. Reg. at 38,063. The Attorney General later notes that if a pre-Act offender started his carceral sentence *before* SORNA took effect and is released on "completion of imprisonment" *after* SORNA takes effect, that offender "can be registered prior to release from imprisonment in the same manner as sex offenders convicted following the enactment of SORNA and its implementation by the jurisdiction." *Id.*

Each of these SMART Guidelines provisions expressly contemplates a scenario in which the sex offender at issue is released from custody at the end of his term of imprisonment for the "registration offense." Thus, jurisdictions must "normally" require registration at that point – a qualification that implies the existence of cases where the duty to register does *not* attach at the end of the sentence imposed as punishment for the registration offense. This is one such case, as Gundy's consecutive sentence makes him unlike the "normal" sex offender. Further, states must register an offender before he is "released from custody," on "completion of imprisonment," or on "release from imprisonment." This language further supports the conclusion that the Attorney General was not considering a situation like Gundy's in promulgating these rules. Even to the extent that Gundy was technically "released" from imprisonment for his registration offense when the basis for incarceration in Maryland shifted from a state crime to violation of supervised release, his continued presence behind bars removed him from the class of offenders

contemplated by the plain terms of the SMART Guidelines. Thus, the SMART Guidelines arguably endorse Gundy's view of when he was required to register, since they repeatedly and logically link the initial registration requirement to release from custody.[3] In the alternative, they are ultimately silent as to this matter because it is not a "normal[]" case and the Court must look directly to § 16913(b)—the statute that the Attorney General is interpreting in the Guidelines.

The upshot of this analysis is that Gundy's duty to initially register was triggered shortly before he was released from custody in New York. Gundy was in custody when transferred from the Maryland prison to FCI Schuylkill, and then, by the plain language of the transfer documents, remained in the "legal custody of the [Attorney General], in service to a term of imprisonment" during his unsupervised transfer from Pennsylvania to New York. These documents confirmed that his transfer "only extend[ed] the limits of [his] confinement" and his "custody." As a sex offender who was imprisoned for committing a sex offense and who then remained in custody continuously through his release in New York—first while serving a sentence imposed as punishment for the sex offense, and then while serving a post-revocation sentence "with respect to" the sex offense—Gundy was not "required to register" when he engaged in the interstate travel alleged in the Indictment and therefore cannot be held liable for a violation of § 2250.

Accordingly, the Indictment must be dismissed.

C. Gundy's Other Arguments In Support of Dismissal

Gundy also advances a number of other arguments in support of dismissal. Because the Court has granted his motion on statutory grounds, it need not reach his constitutional claims.

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[3] This analysis might be different if Gundy had been sentenced to consecutive prison terms for crimes that bore no relation—for instance, a sex offense and then an unrelated bank robbery—since in that scenario the robbery sentence might not qualify as a term of imprisonment "with respect to" to the sex offense. However, that issue is not presented in this case.

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss the indictment is GRANTED.

SO ORDERED.

Dated: New York, New York
May 22, 2013

J. PAUL OETKEN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	13 Crim. 8 (JPO)
HERMAN AVERY GUNDY, Defendant.	:	OPINION AND ORDER

J. PAUL OETKEN, District Judge:

Defendant Herman Avery Gundy was charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250. On May 22, 2013, this Court granted Gundy's motion to dismiss the indictment, holding that Gundy was not subject to SORNA's registration requirements at the time of the interstate travel alleged by the Government. *United States v. Gundy*, No. 13 Crim. 8, 2013 WL 2247147 (S.D.N.Y. May 22, 2013) ("the Opinion"). Advancing new arguments, the Government now seeks reconsideration of the Opinion. Though responsive to some of the concerns addressed in the Opinion, these arguments do not succeed. For the reasons that follow, the motion for reconsideration is denied.

I. Legal Standard

"A motion for reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Drapkin v. Mafco Consol. Group, Inc.*, 818 F. Supp. 2d 678, 695 (S.D.N.Y. 2011) (quotation marks and citation omitted). Accordingly, "[t]he threshold for prevailing on a motion for reconsideration is high." *Nakshin v. Holder*, 360 F. App'x 192, 193 (2d Cir. 2010); *see Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) ("The standard for granting such a motion is strict."). "Although the federal

and local rules of criminal procedure do not specifically provide for motions for reconsideration, courts in this district have applied Local Civil Rule 6.3 in criminal cases." *United States v. Peterson*, No. 12 Crim. 409, 2012 WL 5177526, at *1 (S.D.N.Y. Oct. 19, 2012).

II. Discussion[1]

The Supreme Court has held that a person commits a violation of § 2250 only if he (1) is "required to register under [SORNA]"; (2) *subsequently* "travels in interstate or foreign commerce"; and (3) *subsequently* "knowingly fails to register . . . ." 18 U.S.C. § 2250; *see Gundy*, 2013 WL 2247147, at *3 (citing *Carr v. United States*, 560 U.S. 438 (2010)). In the Opinion, this Court concluded that the first element was not met until *after* Gundy traveled in interstate commerce. This is because, as the Court explained: (1) Gundy's duty to "initially register" under 18 U.S.C. § 16913 arose just before completion of "a sentence of imprisonment with respect to the offense giving rise to the registration requirement"; (2) Gundy's federal sentence for violation of supervised release ("VOSR") based on his Maryland conviction—which immediately followed his sentence on the Maryland conviction itself—was "a sentence of imprisonment with respect to the offense giving rise to the registration requirement" (namely, the Maryland sex offense); and (3) Gundy did not complete that federal sentence until *after* he traveled in interstate commerce. *See Gundy*, 2013 WL 2247147, at *4-13.

A.

The Government's request for reconsideration opens with an argument that it did not advance in its original brief, at oral argument, or in its post-argument brief. This argument focuses on the third word of 18 U.S.C. § 16913(b)(1): "before completing *a* sentence of

[1] Familiarity with the Opinion and all other facts relevant to the case is presumed.

imprisonment with respect to the offense giving rise to the registration requirement." (emphasis added). In the Government's view, that single word controls this case: Because the sentence for his Maryland conviction was "a sentence of imprisonment," and because the statute refers to "a" sentence rather than "any" or "all" sentences, Gundy's duty to register attached on or before November 30, 2010—the date on which he completed the sentence for his Maryland conviction and thus, by implication, the date before which he was required to initially register. *See* § 16913 (b)(1). This is so, the Government argues, because he literally completed "*a* sentence of imprisonment with respect to the [sex] offense" on that date—even though he was not released and was immediately transferred to federal custody to begin serving *another* "sentence of imprisonment with respect to the [sex] offense."

This argument, although presenting a stronger textual basis for the Government's position than its previous arguments, must be rejected for several reasons.

First, motions for reconsideration are not the appropriate mechanism for advancing purportedly dispositive arguments for the first time. As the Second Circuit has emphasized, "[g]enerally, motions for reconsideration are not granted unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Cioce v. County of Westchester*, 128 F. App'x 181, 185 (2d Cir. 2005). Accordingly, "a party may not advance new facts, issues, or arguments not previously presented to the Court." *Polsby v. St. Martin's Press, Inc.*, No. 97 Civ. 690, 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (citation omitted). "Simply put, courts do not tolerate such efforts to obtain a second bite at the apple." *Goonan v. Fed. Reserve Bank of New York*, No. 12 Civ. 3859, 2013 WL 1386933, at *2 (S.D.N.Y. Apr. 5,

2013). By waiting until this late stage in the case, and failing to identify any new decision or data in support of its plain language interpretation, the Government has waived this argument.

Second, even on its own terms, the Government's argument does not rid § 16913(b)(1) of the ambiguity that required invocation of statutory purpose and the rule of lenity.

"As in any statutory construction case," analysis begins with the statutory text and "proceed[s] from the understanding that [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (internal quotation marks and citations omitted). "The meaning of a word [or phrase] cannot be determined in isolation, but must be drawn from the context in which it is used.'" *United States v. Torres*, 703 F.3d 194, 199 (2d Cir. 2012) (quoting *In re Sept. 11 Prop. Damage Litig.*, 650 F.3d 145, 155 (2d Cir. 2011)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 168 (2012) (noting that "statutory construction is a holistic endeavor"). "If the text of a statute [remains] ambiguous, then [the Court] must construct an interpretation consistent with the primary purpose of the statute." *United States v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003).

Section 16913(b) provides that a sex offender shall initially register "before completing a sentence of imprisonment . . . ." While the Government sees perfect clarity in this sentence, § 16913(b)(1) remains ambiguous in a crucial respect: by using the indefinite article to modify "sentence of imprisonment," Congress failed to distinguish between "any" and "a single." This distinction makes all the difference to Gundy.

As a matter of plain language, the Government's reading is certainly a legitimate one. Consider the sentence: "You must apply for kindergarten before completing a year of preschool." It is fairly obvious from the context of the sentence that "*a* year of preschool" is intended to mean "*a single* year of preschool." But consider the following directive from a

doctor: "You must take one of these pills before finishing a meal" (or "Take one pill with a meal"). This is probably better read as meaning "before finishing *any* meal" (or "with *any* meal"). And consider the sentence: "You must stay out of the swimming pool until 15 minutes after eating a candy bar." Given the context, the better reading of this sentence is that it refers to *any* candy bar—and that if someone ate three candy bars consecutively, the 15-minute moratorium would be triggered by the eating of the *third* candy bar.

The meaning of "a" thus depends on context. *See, e.g.*, *Hagen v. Nodak Mutual Insurance Co.*, No. 99 Civ. 3562, 2000 WL 35528125 (D.N.D. May 8, 2000) ("As a general principle the use of an indefinite article may create an inherent ambiguity, depending on how the indefinite nature of the article is interpreted."). Although statutory context can eliminate ambiguity, *see S.E.C. v. KPMG LLP*, 412 F. Supp. 2d 349, 388 (S.D.N.Y. 2006), nothing else in § 16913(b) settles the choice between these two meanings of "a." While Gundy had completed "a single" sentence of imprisonment when time expired on the sentence for his Maryland conviction, SORNA can also be read to impose a duty to register before completing "any" sentence of imprisonment. In the latter case, the most natural reading (or at least a possible reading) of § 16913(b) is one that requires a defendant like Gundy—sentenced to multiple, consecutive terms of imprisonment "with respect to" the offense giving rise to the registration duty—to register before completing his final sentence of imprisonment.[2] Given this ambiguity in the statutory text, the Court must consult statutory purpose and the rule of lenity. As

[2] As noted in the Opinion, the Guidelines promulgated by the Attorney General lend support to this reading. They state that "SORNA's registration requirements generally come into play *when sex offenders are released from imprisonment*, or when they are sentenced if the sentence does not involve imprisonment." *Gundy*, 2013 WL 2247147, at *9 (quoting 73 Fed. Reg. 38,030, 38,045) (emphasis added).

explained in the Opinion, these factors cut strongly in Gundy's favor. *See* 2013 WL 2247147, at *8-12.

Third, the structure of the statutory text provides a simpler explanation for the statute's use of the word "a"—one that weakens the Government's textual argument.

The discussion thus far has assumed that the Government correctly framed the relevant question by focusing narrowly on § 16913(b)(1). It is a basic rule of interpretation, however, that each sub-section of a statute must be read in the context of the larger statutory structure. As its title indicates, § 16913(b) is concerned with the timing of initial registration. To that end, § 16913(b) contemplates two classes of offenders: those who have been sentenced to imprisonment, § 16913(b)(1), and those who received non-carceral sentences, § 16913(b)(2). When Congress referred to offenders who have completed "a sentence of imprisonment," it did so only to distinguish offenders who received "a sentence *of imprisonment*" from offenders who were "*not* sentenced to a term of imprisonment." (emphasis added). This perspective clarifies why Congress used the indefinite article in § 16913(b)(1): it was not concerned with (or apparently aware of any need for) specifying *which* sentence of imprisonment triggers the duty of initial registration, but rather with separating those offenders who have received a carceral sentence from those who have received a non-carceral sentence. Use of the indefinite article to describe these classes makes sense, whereas it would have been strange for Congress to use the indefinite article as its method of indicating when in time a duty of initial registration attaches. As a result, it would be erroneous to require "a" to bear all the weight the Government places on it. In statutory context, the word "a" simply does not bear on the question whether Gundy's initial registration duty attached at the end of his Maryland sentence. Accordingly, the Government's first textual argument does not succeed.

B.

The Government's second argument for reconsideration focuses on "with respect to." In sum, the Government notes that "offense" is used throughout SORNA to refer to the crime of conviction resulting in a defendant's registration obligation—in this case, Gundy's Maryland sex crime. Emphasizing that a violation of supervised release is distinct from any underlying state offense, and that Gundy's VOSR sentence punished his "breach of trust," the Government argues that the two convictions cannot be said to be "with respect to" one another.

The Court has already addressed and rejected an essentially identical version of this argument. *See Gundy*, 2013 WL 2247147, at *7-8. The Government is mistaken in its suggestion that the Opinion treated the VOSR sentence as part of, or as an extension of, the Maryland sentence. *See id.* at *7-8, *11; *see also id.* at *11 n.2 ("The Government raises the specter of a constitutional concern with this conclusion, since postrevocation penalties relate to the initial offense—and would raise an issue of double jeopardy if they were treated as punishment for the new criminal offense. *See Johnson v. United States*, 529 U.S. 694, 700 (2000). But that concern is misplaced. Acknowledging that Gundy's sentence for violation of his supervised release is a sentence 'with respect to' his Maryland criminal offense is not the same as concluding that it constitutes punishment for that offense. In other words, the Court can recognize the reality of a relationship between Gundy's conduct in Maryland and his post-revocation penalties without implicating the double jeopardy issue noted in *Johnson*. As a result, there is no need to construe 'with respect to' in the shadow of constitutional avoidance."). As the Court noted in the Opinion, the phrase "with respect to" connotes relationships other than identity. *Id.* at *8. Here, "the violation that caused [Gundy's] [VOSR] sentence consisted of

exactly the same conduct that gives rise to his registration requirement." *Id.* Further, that conduct constituted a violation of the terms of Gundy's supervised release only because it was, in fact, prohibited by the criminal law—and the terms of Gundy's supervised release were keyed, in part, to compliance with that body of law. At the very least, SORNA's text is ambiguous as to whether his VOSR offense was an offense "with respect to" his Maryland conviction.

C.

The Government also argues that treating Gundy as having been "required to register" no later than November 30, 2010 is consistent with SORNA's purpose. The Court considered and rejected similar purpose-related arguments in the Opinion, concluding that SORNA's purpose—as expressed in Second Circuit and Supreme Court precedent, the statutory text, and the Attorney General's implementing regulations—cuts firmly in Gundy's favor. *See id.* at *8-12. The Government advances only one novel argument: given that SORNA requires offenders to register in the jurisdiction of their conviction, and that SORNA aims to ensure that authorities do not lose track of sex offenders, it would be consistent with SORNA's purpose to prefer a rule whereby sex offenders register while incarcerated in the jurisdiction of their offense.

Even to the extent that this argument clarifies an aspect of SORNA, the core purposes and operation of the statute, as described in the Opinion, override this single factor. *See id.* at *9 ("Given that there is virtually no risk that a sex offender will fall through the cracks or go missing while incarcerated, it would make little sense to apply SORNA's registration requirements and criminal provisions to incarcerated individuals. In fact, Congress recognized that the public is adequately protected against sex offenders locked behind bars: this is why sex offenders are not required under § 16913(b) to initially register until the *end* of their post-

conviction carceral sentences."); *id.* at *10 ("A clear focus on offenders outside of custody runs through SORNA's text and its implementing regulations."). So do the weighty considerations of fairness and federalism—unaddressed in the Government's brief—that the Opinion highlighted as critical to any understanding of SORNA. *See id.* at *10 ("Inmates are regularly moved between jurisdictions while in custody. Often, these transfers are orchestrated without their consent. Even if those inmates enjoyed an affirmative defense under § 2250(b) to liability under § 2250(a) for failure to register while imprisoned, the result would [be] that a significant number of inmates have already satisfied elements (1) and (2) of § 2250 the moment they step past prison gates on their way to freedom. Failure to register within a short period would then perfect the § 2250 offense and return them to federal prison for an offense that, in the usual course, would implicate only the requirements of state sex offender registration schemes."); *id.* at *11 ("The Government's proposed interpretation of SORNA would [] result in a disruption of the state-federal balance contemplated by Congress, as it would federalize a large swath of post-custody failure-to-register offenses that do not reflect any uniquely federal power or concern . . . . Moreover, this disruption in federalism would arise in a context shot through with questions of fundamental fairness, since in many cases the predicate act of interstate travel would have been imposed on an unwilling sex offender—who might well be excused from recognizing that failure to register in his new state violates SORNA, instead of state law.").

In any event, the Government's arguments rest on questionable assumptions. It is not clear, for instance, why an offender's jurisdiction of conviction is "uniquely situated to know whether the offender has been convicted of a sex offense." When inmates are transferred within jurisdiction or to new jurisdictions, there is every reason to believe that information about their offense and post-conviction requirements travels with them. Every facility to which Gundy was

transferred, for example, was well aware of his status as a sex offender—and the Government offers no concrete evidence for its suggestion that prison officials have a difficult time tracking sex offender status.[3] Further, if an inmate were transferred from state to state—or from facility to facility—after initially registering, he would still have to register at each new location to ensure that the jurisdiction of conviction did not lose track of him. As a result, the reading of SORNA advanced by the Government still involves a series of registrations as inmates are moved from prison to prison—and thus presupposes the adequacy of registration schemes across facilities as prisoners are moved from one to the next. While initial registration may be unique in some respects, the Government has not explained how and why that uniqueness compels a rule that imposes a duty of initial registration at the end of the first prison sentence with respect to the offense giving rise to the registration duty. More broadly, the Government has not identified any reason for concluding that the view of SORNA set forth in the Opinion would thwart full realization of SORNA's purpose. Accordingly, the Government's purpose-based arguments do not warrant reconsideration of the Court's decision.

D.

In his motion to dismiss the indictment, Gundy presented several additional arguments for dismissal of the indictment which the Court did not reach, including (1) that SORNA violates

[3] There is little record evidence addressed to the question of why Gundy did not register as a sex offender when he completed his Maryland sentence—or to the question of why Maryland State officials, who the Government insists are in the best position to handle such matters, failed to ensure Gundy's registration. But the record is replete with evidence that federal officials *were* aware of Gundy's status as a sex offender and *did* remind him of his duty to register. The facts of this case thus suggest that, in at least some instances, officials in the jurisdiction of conviction will be less capable than officials in a jurisdiction to which an inmate is transferred of ensuring that the inmate complies with SORNA's registration requirements.

the Commerce Clause and (2) that Gundy cannot lawfully be found to have "traveled in interstate commerce" for purposes of criminal liability because he was "in custody" at the time of his interstate travel. In light of the Court's decision to deny reconsideration, it is unnecessary to resolve these alternative arguments. It should be noted, however, that the Second Circuit recently considered a Commerce Clause challenge to SORNA based (like Gundy's challenge) on the Supreme Court's decision in the Affordable Care Act case, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"). The Second Circuit declined to revisit a prior decision upholding SORNA under the Commerce Clause, "not because [the defendant's] arguments all lack force, nor because the constitutionality of SORNA – particularly when applied within the states – is beyond question . . . , but because the constitutionality of SORNA *as applied to [the defendant]*" remains unaffected by any limitations on Congress's Commerce Clause power that may be found in *NFIB*." *United States v. Robbins*, 2013 WL 4711394, at *1 (2d Cir. Sept. 3, 2013) (emphasis in original). Applying the distinction between regulation of "activity" and "inactivity" from *NFIB*,[4] the Second Circuit in *Robbins* concluded that, as applied to the defendant in that case, SORNA regulated "activity" – "his change of residence and travel across state lines" – and that such activity "directly employ[ed] the channels of interstate commerce." *Id.* at *4.

This case presents closer questions under that analysis. In particular, is it fair to say that Gundy "traveled across state lines" for purposes of this criminal statute and the Commerce Clause given that he was *in custody* when he did so? And in light of his custodial status, was he

[4] The *Robbins* court noted that it is unclear whether the discussion of the Commerce Clause in Chief Justice Roberts' primary opinion in *NFIB* constitutes "more than dicta," *id.* at *4, but assumed for the sake of the argument that the statements about the Commerce Clause in that opinion – including the significance of the activity-inactivity distinction – constitute a holding of the Court when joined with the consistent views of the four dissenting Justices, *id.*

"employ[ing] the channels of interstate commerce" in doing so? As noted, it is unnecessary to resolve those questions here. To the extent that these questions present serious constitutional issues, however, the doctrine of constitutional avoidance provides yet another basis for this Court's interpretation of the statute as applied to this case. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (Brandeis, J., concurring).

III. Conclusion

For the foregoing reasons, the Government's motion for reconsideration is DENIED.

SO ORDERED.

Dated: New York, New York
September 11, 2013

J. PAUL OETKEN
United States District Judge

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

SDNY

UNITED STATES DISTRICT COURT

ELECTRONICALLY FILED

Southern District of New York

DOC #:

DATE FILED: MAY 27 2016

UNITED STATES OF AMERICA
v.
Herman Avery Gundy

JUDGMENT IN A CRIMINAL CASE

Case Number: 13 CR 08 (JPO)

USM Number: 47591-054

Mark Gombiner
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. One

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 2250	Failure to Report as a Sex Offender	10/31/2012	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/27/2016
Date of Imposition of Judgment

Signature of Judge

Hon. J. Paul Oetken, U.S.D.J.
Name and Title of Judge

5/27/16
Date

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Time Served

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SPECIAL CONDITIONS OF SUPERVISION

The defendant will register with the state sex offender registration agency in any state where he resides, where he is employed or works, and shall provide proof of registration to the probation officer.

The defendant shall participate in an outpatient substance abuse treatment program approved by the Probation Office, which may include testing to determine whether you have reverted to using drugs or alcohol. The defendant shall contribute to the costs of services rendered based on ability to pay and availability of third-party payment. The Court authorizes the release of available drug treatment evaluations and reports, including the presentence report, to the substance abuse treatment provider.

The defendant shall undergo a sex-offense-specific evaluation and participate in a sex offender treatment and/or outpatient mental health treatment program approved by the probation officer. The defendant shall abide by the rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing. The defendant shall waive confidentiality with respect to any records for mental health assessment and treatment imposed as a consequence of this judgment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant shall contribute to the costs of services rendered based on the ability to pay or availability of third party payment. The Court authorizes the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the sex offender treatment provider and/or the mental health treatment provider.

The defendant shall report to the nearest Probation Office within 72 hours of the judgment.

The defendant shall be supervised by the district of residence.

The fine is waived because of inability to pay.

The defendant will pay a special assessment in the amount of $100.00

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
[redacted]			
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

JUN 0 1 2016

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
V.
Herman Avery Gundy

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 13 CR 08 (JPO)
USM Number: 47591-054
Mark Gombiner
Defendant's Attorney

Date of Original Judgment: 5/27/2016
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☑ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☑ was found guilty on count(s) One after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 2250	Failure to Report as a Sex Offender	10/31/2012	One

The defendant is sentenced as provided in pages 2 through 1 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/1/2016
Date of Imposition of Judgment

Signature of Judge

Hon. J. Paul Oetken, U.S.D.J.
Name and Title of Judge

6/1/16
Date

A000068

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Time Served

☐ The court makes the following recommendations to the Bureau of Prisons:

✱ ☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ _____ ☐ a.m. ☐ p.m. on _____ _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ _____ _____ _____ to _____ _____ _____

a _____ _____, with a certified copy of this judgment.

_____ _____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SPECIAL CONDITIONS OF SUPERVISION

The defendant will register with the state sex offender registration agency in any state where he resides, where he is employed or works, and shall provide proof of registration to the probation officer.

The defendant shall participate in an outpatient substance abuse treatment program approved by the Probation Office, which may include testing to determine whether you have reverted to using drugs or alcohol. The defendant shall contribute to the costs of services rendered based on ability to pay and availability of third-party payment. The Court authorizes the release of available drug treatment evaluations and reports, including the presentence report, to the substance abuse treatment provider

The defendant shall undergo a sex-offense-specific evaluation and participate in a sex offender treatment and/or outpatient mental health treatment program approved by the probation officer. The defendant shall abide by the rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing. The defendant shall waive confidentiality with respect to any records for mental health assessment and treatment imposed as a consequence of this judgment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant shall contribute to the costs of services rendered based on the ability to pay or availability of third party payment. The Court authorizes the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the sex offender treatment provider and/or the mental health treatment provider.

The defendant shall report to the nearest Probation Office within 72 hours of the judgment.

The defendant shall be supervised by the district of residence.

The fine is waived because of inability to pay.

The defendant will pay a special assessment in the amount of $100.00

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below, or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case (NOTE: Identify Changes with Asterisks (*))
Sheet 1

CLERK FILED
JUN 16 2016

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
V.
Herman

2nd AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 13 CR 08 (JPO)
USM Number: 47591-066*
Mark Gombiner
Defendant's Attorney

Date of Original Judgment: 6/1/2016
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☑ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☑ was found guilty on count(s) One after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 2250	Failure to Register as a Sex Offender	[redacted]	One

The defendant is sentenced as provided in pages 2 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/16/2016
Date of Imposition of Judgment

Signature of Judge

Hon. J. Paul Oetken, U.S.D.J.
Name and Title of Judge

6/16/16
Date

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Time Served

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SPECIAL CONDITIONS OF SUPERVISION

The defendant will register with the state sex offender registration agency in any state where he resides, where he is employed or works, and shall provide proof of registration to the probation officer.

The defendant shall participate in an outpatient substance abuse treatment program approved by the Probation Office, which may include testing to determine whether you have reverted to using drugs or alcohol. The defendant shall contribute to the costs of services rendered based on ability to pay and availability of third-party payment. The Court authorizes the release of available drug treatment evaluations and reports, including the presentence report, to the substance abuse treatment provider.

The defendant shall undergo a sex-offense-specific evaluation and participate in a sex offender treatment and/or outpatient mental health treatment program approved by the probation officer. The defendant shall abide by the rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing. The defendant shall waive confidentiality with respect to any records for mental health assessment and treatment imposed as a consequence of this judgment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant shall contribute to the costs of services rendered based on the ability to pay or availability of third party payment. The Court authorizes the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the sex offender treatment provider and/or the mental health treatment provider.

The defendant shall report to the nearest Probation Office within 72 hours of the judgment.

The defendant shall be supervised by the district of residence.

The fine is waived because of inability to pay.

The defendant will pay a special assessment in the amount of $100.00

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
[redacted]			

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Herman Avery Gundy
CASE NUMBER: 13 CR 08 (JPO)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

G5RSGUNS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 13 CR 08 (JPO)

HERMAN AVERY GUNDY a/k/a HERMAN GRUNDY,

Defendant.

----------x

New York, N.Y.
May 27, 2016
11:00 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BRENDAN QUIGLEY
EMIL BOVE
Assistant United States Attorneys

FEDERAL DEFENDERS OF NEW YORK
Attorneys for Defendant
BY: MARK B. GOMBINER

ALSO PRESENT: Megan Hauptman, paralegal

(Case called)

MR. BOVE: Good morning, your Honor. Emil Bove and Brandon Quigley for the government.

THE COURT: Good morning.

MR. GOMBINER: Mark Gombiner, Federal Defenders for Mr. Gundy. And with me at counsel table is Megan Hauptman, who is a paralegal in our office.

THE COURT: Good morning. We are here today for sentencing in this case.

Mr. Gundy was found guilty on March 28 of this year following a bench trial on stipulated facts to one count of failure to register under the Sex Offender Registration and Notification Act, or SORNA, in violation of 18 U.S.C. 2250.

I want to start by going through and making sure I received all the materials I should have. I have reviewed the presentence report with sentencing recommendation dated May 23, and I received letters from defense counsel and from counsel for the government, both dated May 25.

Do I have everything I should have as far as you know?

MR. BOVE: Yes, your Honor.

MR. GOMBINER: Yes, Judge.

THE COURT: Mr. Gombiner, have you read the presentence report and discussed it with your client?

MR. GOMBINER: Yes, I have, Judge.

THE COURT: Mr. Gundy, have you had a chance to read

the presentence report and discuss it with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Mr. Bove, have you read the presentence report?

MR. BOVE: Yes, Judge.

THE COURT: Does anyone have any objections?

MR. GOMBINER: To the guideline calculations, yes, Judge.

THE COURT: Right. The guideline calculation -- and I agree with the points made in the letters, which I think the government does not dispute -- that three points acceptance of responsibility are at least potentially appropriate and I intend to award the three points.

MR. GOMBINER: Other than that, we don't have any objections.

THE COURT: Mr. Bove?

MR. BOVE: I agree with that point about the guidelines, your Honor, and have no objections to the report otherwise.

THE COURT: OK. You have no other objections to the report, Mr. Gombiner?

MR. GOMBINER: No.

THE COURT: I am adopting the facts set forth in the presentence report as my findings of fact.

The starting point, as you know, is the sentencing

guidelines with respect to any sentencing decision in the federal system. The court is no longer required to follow the guidelines, but they are still advisory and they are the starting point in any sentencing decision and provide an important glide post.

Based on the letters of the parties and my review of the guidelines and the presentence report, I differ with the presentence report's guideline calculation with respect to the three-level adjustment for acceptance of responsibility, but I otherwise adopt the guideline calculation.

The base offense level in this case is 16, under Section 2A3.5 of the guidelines. I do find that a three-level downward adjustment is warranted under Section 3E1.1, as explained in comment two, whereas here the defendant did not contest the facts or his factual guilt, but went to trial solely to preserve an issue for appeal and did so on stipulated facts.

The guideline points for acceptance of responsibility may be warranted in an appropriate case, and I find that they are warranted in this case, given that there was a good faith issue that's been argued and is intended to be preserved for appeal, and that is the reason the trial was done with a bench trial on stipulated facts.

I find that the acceptance of responsibility is a three-point downward adjustment and therefore the total offense

level is 13. The defendant's criminal history category is IV, because he had eight points total criminal history points, six from his two prior adult convictions and two under Section 4A1.1(d), because the offense was committed while the defendant was under a criminal justice sentence. Therefore the guideline range is 24 to 30 months.

I'll now give each of you an opportunity to speak. I have read your letters. If there is anything you would like to add, you may.

I'll start with Mr. Gombiner.

MR. GOMBINER: Judge, we would very strongly urge the court to adopt the recommendation of the probation office, which even under the considerably higher guideline range, they had calculated they recommended a sentence of time served. I think that is clearly the appropriate sentence in this case.

Just one thing Mr. Gundy would like to make clear to the court is when he was released from the Bronx Residential Center, he was basically told that they would contact him to let him know when he needed to register, because there was an issue with the fact that he was also required to register in Maryland. So he didn't provide an address to probation, to the residential center, and I think that is where he was arrested. We are not saying that he didn't factually -- we stipulated to that. I don't think that is totally a legal defense, but Mr. Gundy would just like to let the court know that.

Other than that, Mr. Gundy has been in custody now for just about -- I think about 41 months now, maybe 42 months. I think that's enough time. He would like to get back to Maryland and hopefully lead a better life. There wasn't any issues when he -- although he didn't register, there weren't any new issues.

THE COURT: What is the status? Is there still a pending detainer in Maryland?

MR. GOMBINER: I think he got sentenced in Maryland, so some of the time, he's been serving some of the time under the Maryland sentence, I believe, but I think that is about completed now.

THE COURT: Was he out of custody at some point during those 41 months? Because the PSR says he has a two-year-old son.

MR. GOMBINER: There was, I think, a brief period of time that he was out of custody. There may be about six months. But still, he has been in custody for about 35 months, I guess.

I mean, hopefully we don't have to -- it's kind of a confusing situation. I think that's what started this thing in the first place, because there was this confusion about -- maybe confusion isn't the right word -- but there was, I think, some issues as to where he was supposed to be registering and where he was supposed to be living and who was supposed to be

supervising him.

But in any event, putting all that aside, the bottom line is, I think a sentence of time served is definitely warranted here. And I could go on longer, but hopefully I don't need to, unless the court has further questions.

THE COURT: That's fine.

Mr. Bove, is there anything you would like to add?

MR. BOVE: Your Honor, we have identified in our letter, from our perspective, the principal aggravating factors here, which are the defendant's criminal little and risk of recidivism. That is illustrated just to the point that we were just discussing by paragraph 43 of the PSR, which reflects that during the time that the defendant was at liberty during the pendency of this case, that he was rearrested, albeit on a relatively minor charge.

THE COURT: So explain to me, if you can, as I understand it, he was arrested in late 2012. And then was he then transferred to Maryland custody, or what exactly was the narrative here?

MR. BOVE: My understanding is that, following your Honor's ruling in this case, he was then transferred to Maryland custody based on what I understood to be a probation violation or an alleged probation violation arising from the same set of facts.

THE COURT: The failure to register?

MR. BOVE: Yes, your Honor. And then brought back into federal custody pursuant to a writ for purposes of the continued resolution of this case.

Before he made it back up here on the writ, there was a period where he was at liberty, which we did discuss, which did involve this new arrest.

THE COURT: That was here or in Maryland? That's what I was confused by.

MR. BOVE: I think it is in Hagerstown, Maryland, your Honor, based on the PSR. We are looking at paragraph 43 there for that.

MR. GOMBINER: Judge, just to be clear, it was for driving with a suspended license.

THE COURT: Got you.

MR. GOMBINER: When I said he didn't commit, maybe I misspoke technically, but I don't think that's really the kind of behavior we are concerned about. I mean, I am not saying that it is right, but that's not obviously the most heinous of all crimes.

MR. BOVE: I made that point as well, your Honor. It is not a significant arrest. The fact is that there was an arrest, and I was making that objection.

All that said, we are essentially mindful that the defendant has spent a significant amount of time in federal custody relative to the charge and the guidelines range in this

case.

THE COURT: Thank you.

Mr. Gundy, if there is anything you would like to say? You may. You are not required to, but you are welcome to, if you would like.

THE DEFENDANT: Yes.

OK. The last 15 times I have been in front of you, this is the first time I actually get a chance to speak to you. I am going to give you a broad -- so you can understand what just happened in the last four years since 2012 and 2016.

I was sentenced to 20 years all suspended, but for ten for the overall charge. I got out after doing eight years. There's a program that you can go to, a halfway house. You can't ask for this program, you have to be granted these programs in the federal custody. And they can put you in for the programs, they deem you a credible inmate, you're a good model inmate.

I was given this program and went to the halfway house. I went to the halfway house. I completed all of the programs. Two 12-hour days they brought me to a sex offense treatment program that I hook up to monitors and did everything. New York City deemed me not a threat and asked me if I had a reliable address. I gave them the address. I went to this address. I got my birth certificate, Social Security, and my identification and got a job in New York City.

New York City police arrested me because Maryland had a warrant out, because they said I left the halfway house and went to New York. They said I left the federal prison and went to New York City. I never did that. I went from custody to New York City to the halfway house. Maryland didn't know nothing about the halfway house.

So now they arrested me and sent me back to Maryland. When I get back to Maryland, within the same week, the same month, New York City comes and takes me back from Maryland back to New York and charged me with this charge, SORNA. I don't know nothing about SORNA. I did not know I was breaking the law by leaving a halfway house. I thought I was doing something trying to get myself back into society after eight years.

So I didn't realize I was committing a crime by getting on a bus and going to New York City to a halfway house. If I would have did that, at 41 years old, I would not have took the program. I took the program to rehabilitate myself.

OK. Now I am fighting this charge at MDC Brooklyn for eight months. You dismissed this charge. Thank you. You sent me back to Maryland. I go back to Maryland, and I am sentenced for five years for -- they let me out and they rearrested me again and gave me five years' sentence. That's when the baby comes in, the two-year-old son. The five years' sentence they give me for violations.

OK. I take the violation. I am doing my time. This charge comes back up again while I am doing my time, and I am transferred back here again and served seven more months now. So this is 15 months I served in MDC Brooklyn in your custody.

Now I am asking for consideration of what I just went through not knowing what crime that I did commit. If I would have known this, your Honor, I would not have done it. I would not just simply get up and tell them this, I want to go to a halfway house, knowing I am breaking the law. I am not going to do that.

THE COURT: But you know that you're someone who needs to register as a sex offender?

THE DEFENDANT: I never -- I never -- nobody has never taught me this out of eight years being in the state custody. They never sat me down and said okay, this is what you need to do, A, B, C, D. They never did that. They said go to the street and figure it out. They don't have time to tell us nothing in prison. We in prison. So you do what you're supposed to do.

And now, if I had known I had to walk into the police station -- Sara Baumgartel told me, you have to walk into a police station. Now I know. If you let me, I will go to the police. I have no problem with doing that. I follow all rules and regulations. I just didn't know what to do. I gave them the address that they asked me for. I only did what the

government told me to do. I didn't stray off the path. I didn't go anywhere else. I did exactly what I was told to do.

So I am here today asking that you take that into consideration, that I didn't knowingly do this on purpose. This is not something -- I accept full responsibility of what happened, but I didn't do it on purpose, you know.

So thank you.

MR. GOMBINER: Judge, can I just make one observation?

THE COURT: Sure. I'll give you each a chance.

MR. GOMBINER: We are not trying to relitigate the case here, but I just want to inform the court that when we were thinking of going to trial on this case, I just went on the Internet to try to see, well, what do you need to do? How do you register as a sex offender in New York? It is not at all obvious what you are supposed to do or where you are supposed to go.

All right. This is just an observation, it doesn't necessarily pertain directly to this case, but I think, just as an overall thing, it might be helpful if there was some more clear instructions as to -- a clear path as to how you are supposed to accomplish registration as a sex offender in New York.

I mean, he was supposed to register. We are not saying -- we admitted that conduct. We are not backing away from it. I mean, we do think that there are legal issues as to

whether it constitutes a crime, what he did, but --

THE COURT: Look, I agree, it is not the clearest statute. That's why I dismissed the indictment because of the rule of lenity, among other things, because as a person required to register and the travel and interstate commerce, it is not the simplest thing when you just read the statute to figure out what is a violation. I was corrected by the Second Circuit in my interpretation of the statute.

MR. GOMBINER: Right.

THE COURT: And that is what it is.

MR. GOMBINER: We are going to get the Supreme Court to correct the Second Circuit.

In any event, all I am saying is that I think, as a practical matter, at least if you just go on the Internet trying to figure out what to do -- I mean, the prosecutors can try it if they would like -- it is not that easy to figure out what you are supposed to do. That's just goes along with what Mr. Gundy was saying.

THE COURT: Fair enough.

Just going forward, when I get to supervised release, I am going to be clear, as a person required to register, however you feel about the sex offender registration statute, basically, wherever you live, you have to go to a police station and say, I am here to register, tell me how. That is what you have to do.

You understand that now, right?

THE DEFENDANT: Yes.

MR. GOMBINER: That's right. We did figure it out, so that is what he is going to do. And we contend he intends to do that, because there is no question now that, you know, he understands exactly what he needs to do. Thank you.

THE COURT: Thank you.

Mr. Bove.

MR. BOVE: Judge, before we get to the appellate corrections that Mr. Gombiner is going to seek in this case, I think it is important that today's proceeding -- that the record be clarified by the defendant specifically, that the statements he just made were offered in an effort to seek leniency in mitigation from your Honor and that he still abides by the factual stipulations that were the basis for the findings in this case, because those stipulations are arguably intentional, some of the things that were said.

MR. GOMBINER: Judge, I mean, I wasn't really advising we get into this at all, but we are not disputing the factual stipulations that we agreed to. We are not disputing that.

I mean, Mr. Gundy is not a lawyer. You know, he maybe doesn't understand all of the ins and outs of it, but we are not backing away. We stipulated those facts. I reviewed them with Mr. Gundy before we stipulated to them. We are not backing away from those.

Thank you, Judge.

THE COURT: The only other thing I want to be clarified, again, is the number of months he has served. I thought it was 41 months. It seems that there was some period of time when he was out of custody.

Is there an agreement on how many months he has, in fact, served pretrial for this?

MR. GOMBINER: I would say, based on what Mr. Gundy says, I think between 34 and 35 months. He has been in custody since October 2012.

MR. BOVE: Your Honor, if we can just have one second?

THE COURT: Sure.

(Discussion off the record)

MR. BOVE: Your Honor, we estimate that it is approximately 12 months in federal custody, based on the charge in this case, based on first being writted here in approximately December 2012 and then being in custody until approximately May of 2013, around the time that your Honor should find the orders in this case.

After the Circuit's opinion, being writted back here in approximately October of 2015 up until today, we estimate that that is maybe 14, approximately 14 months --

THE COURT: 14 months?

MR. BOVE: -- on the federal.

There is no dispute he was in custody in Maryland for

a period of time on the state-related matters while the appeal was pending.

THE COURT: A time served sentence would be a below guideline sentence is what you're saying?

MR. BOVE: Yes.

THE COURT: Because probation recommends time served, but they say in the presentence report that he has served 41 months. You're saying that is wrong?

MR. BOVE: Yes, that he has not served 41 months.

THE COURT: Mr. Gombiner, would you like to address this? I mean this significantly differs from my understanding of what he has served. 14 months, other than the 14 months in federal custody, the rest of that time was seven months while he was not in custody and everything else was on the Maryland violation?

MR. BOVE: That's our understanding.

THE COURT: Do you know the status of the Maryland violation? Is that pending?

MR. GOMBINER: My understanding is that Mr. Gundy, once he completes his federal sentence, he is going to essentially have completed his Maryland sentence, too, that he is going to have to go back to Maryland. So I think even if you impose a sentence of time served, he is not going to get released immediately. I think he is going to have to go back, and which is going to make his sentence longer, he is going to

have to go back to Maryland. I think once he gets back there, I am relying on what Mr. Gundy tells me, but he believes that he will then have pretty much completed his Maryland sentence.

THE COURT: The Maryland sentence is a violation of probation for driving without a license?

THE DEFENDANT: Yes, basically. Yes.

THE COURT: Is that your understanding, counsel for the government?

MR. BOVE: If we can have one second again, your Honor?

THE COURT: Sure.

(Discussion off the record)

MR. BOVE: There are two potential violations of probation here, one related to the sex offense and one relating to the arrest we discussed today. It is not clear to us which of those is still pending and is providing the relevant sentence that he is still in custody on.

THE COURT: Look, one way or another, he has served 41 months, and a large part of that was for this case. It is a long time. The guidelines, bottom of the guidelines, are 24 months.

Does the government have any objection to a time served sentence in this case?

MR. BOVE: I think the office's official position your Honor is well aware with. As we said, we are mindful of the

amount of time the defendant spent in custody one way or another related to this set of facts.

THE COURT: Anything you want to add, Mr. Gombiner?

MR. GOMBINER: No. Hopefully not, no.

THE COURT: Let me just ask, I am inclined to impose a time served sentence in this case. I'll explain that in a minute. The conditions of supervised release, I was going to impose a five-year term of supervised release, which appears to be both the guidelines and the statutory term of supervised release.

Does anyone want to comment on the specific conditions recommended by probation, which include a special condition of drug treatment and testing, as well as a sex offense evaluation and sex offender treatment or mental health program?

MR. GOMBINER: Judge, we don't have any objections to those. I think those could be appropriate. I mean, I don't see how they can really hurt him.

THE COURT: Do you have anything to add?

MR. BOVE: No, your Honor.

THE COURT: Is there any reason sentence may not be imposed at this point?

MR. GOMBINER: No, Judge.

THE COURT: In preparing the sentence, Mr. Gundy, I have considered the presentence report, the recommendation of probation, which does recommend time served, and five years of

supervised release, the written and oral statements of defense counsel, the defendant, and the government, and I have considered each of the factors set forth in the statute that governs my decision, which is 18 U.S.C. 3553(a).

Those include the nature and circumstances of the offense, the defendant's history and characteristics, the purposes of sentencing, which include the need to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence to criminal conduct, and to protect the public.

Also, I need to consider the guidelines, which are the starting point, as I mentioned, and the kinds of sentences available and the need to avoid unwarranted sentencing disparities among similar defendants.

I am ultimately required to impose a sentence that is sufficient but not greater than necessary to comply with the purposes in the statute. Starting with the nature and circumstances of the offense, what Mr. Gundy is being sentenced for is a SORNA violation, a failure to register after traveling in interstate commerce. Congress adapted SORNA in order to strengthen the registration requirements who apply to people who have been convicted of sex offenses, specifically to prevent people from falling through the cracks when traveling between states and failing to register in a new state.

As noted in my earlier decision dismissing the

indictment, I did not think that the statute was particularly clear in its application to a person in Mr. Gundy's situation, who had traveled to a halfway house from Pennsylvania to New York and was technically in custody at the time of his interstate travel. However, the Court of Appeals determined that the statute does apply in that situation, and congress has determined that this is a felony that should be treated seriously, and that is why the guidelines are what they are.

Mr. Gundy is a 41-year-old man who has several prior convictions over the course of many years, including illegal drug convictions on the underlying sex offense for which he was required to register, which is a serious one. I will note that there is a certain amount of confusion in the scheme of sex offender registration statutes. I don't think, ultimately, that provides a defense. I think that the conviction in this case was correct based on the stipulated facts and that I did confirm that those facts were true and that the defendant understood them.

Nevertheless, I do understand Mr. Gundy's comments today as pointing to the confusing nature in certain circumstances of what a defendant faces in these situations. I think sometimes the sex offender's requirements work in such a way that after someone has served time, they end up in this cycle of going back for failing to register for an underlying offense, and it can be intentioned with the goals of getting a

fresh start in your life and trying to lead a law-abiding life.

However, given all the circumstances, the purposes of sentencing, and given the application of the statute here, I believe it does apply, and for the reasons I have explained and the defendant's criminal history, I do believe that the purposes of general deterrence, specific deterrence, and protecting the public make a guideline sentence appropriate here. And by guideline sentence, I mean a 24-month sentence.

Therefore, that's ordinarily the sentence I would impose here is a sentence of 24 months. However, Mr. Gundy has served 41 months. I realize that technically the amount in federal custody pursuant to the statute, pursuant to the charge here, may have been approximately 14 months, but part of the reason that it wasn't longer than that was because I dismissed the indictment and was overturned.

Also, that there was a Maryland violation of probation, one more, a minor offense of driving without a license, and potentially also for the same violation here. In other words, there was significant overlap, I believe. So I believe that you should get credit for at least a portion of the 41 months, to the point where a sentence of time served is appropriate here in light of the purposes of sentencing and the other considerations in the statute.

So I intend to impose a sentence of time served followed by five years of supervised release, as recommended by

probation. I would like to ask defense counsel if you have any objection or know of any legal reason why that sentence may not be imposed?

MR. GOMBINER: No, your Honor.

THE COURT: The same sentence for counsel for the government?

MR. BOVE: No, your Honor.

THE COURT: Mr. Gundy, please stand.

It is the judgment of this court that you be sentenced to incarceration for a period of time already served. Following release you will be placed on supervised release for a period of five years with the following conditions:

You will not commit another federal, state or local crime; you will not possess a illegal controlled substance; you will not possess a firearm or destructive device; the mandatory drug testing condition is suspended because I am imposing a special condition of treatment and testing; you will cooperate in the collection of DNA as directed by probation; you will register with the state Sex Offender Registration Agency in any state where you reside, where you are employed or work; and shall provide proof of registration to the probation officer.

And let me just reiterate, Mr. Gundy, when in doubt, whenever you move to a new state, please do just check in with the police and make sure you're registered. Otherwise, these violations continue to happen. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The standard conditions 1 through 13 are imposed with the following special conditions: You shall participate in an outpatient substance abuse treatment program approved by probation, which may include testing to determine whether you have reverted to the use of drugs. You shall contribute to the cost of services rendered based on ability to pay and availability of third-party payment. I am authorizing the release of available drug treatment evaluations and reports, including the presentence report, to the substance abuse provider, treatment provider. You shall undergo a sex offense specific evaluation and participate in a sex offender treatment and/or outpatient mental health treatment program approved by the probation officer. You shall abide by the rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing. You shall waive confidentiality with respect to any records for mental health assessment and treatment imposed as a consequence of this judgment or to allow the probation officer to review the course of treatment and progress with the treatment provider. You shall contribute to the costs of services rendered based on ability to pay and availability of third-party payment. And I am authorizing the release of available psychological and psychiatric evaluations and reports, including the presentence report to the sex offense

treatment provider or mental health treatment provider. You shall report to the nearest probation office within 72 hours of the filing of the judgment. You shall be supervised by the district of your residence.

There will be no fine because I find you are unable to pay one. However, there is a mandatory $100 special assessment, which is due immediately.

Mr. Gundy, you have the right to appeal from your conviction and sentence. If you're unable to pay the costs of an appeal, you may apply for leave to appeal *in forma pauperis*. Any appeal must be filed within 14 days of the filing of judgment of conviction.

I am directing that a complete copy of the presentence report be provided to the Bureau of Prisons and sentencing commission. Counsel on appeal will have access to the report. The clerk will prepare the judgment and see to it that required documentation is sent to the sentencing commission.

There are no underlying counts to be dismissed, are there?

MR. BOVE: No, your Honor.

THE COURT: Is there anything further?

MR. GOMBINER: No, Judge. Thank you very much. Thank you.

THE COURT: Thank you.

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